5-27-1976

Commonwealth of Kentucky, ex el, Department for Natural Resources and Environmental Protection, et al v. Morris Stephens, et al and Morris Stephens, et al v. Commonwealth of Kentucky, ex el, Department for Natural Resources and Environmental Protection, et al

Amicus Brief 1975-SC-1050

AMICUS BRIEF

SUPREME COURT OF KENTUCKY
NO. 75-1050

539 SW2d 303

COMMONWEALTH OF KENTUCKY, ex rel
DEPARTMENT FOR NATURAL RESOURCES
AND ENVIRONMENTAL PROTECTION, et al., APPELLANTS,

vs.

MORRIS STEPHENS, et al., APPELLEES.

and NO. 75-1099

MORRIS STEPHENS, et al., CROSS-APPELLANTS,

vs.

COMMONWEALTH OF KENTUCKY, ex rel
DEPARTMENT FOR NATURAL RESOURCES
AND ENVIRONMENTAL PROTECTION, et al., CROSS-APPELLEES.

and NO. 75-1177

COMMONWEALTH OF KENTUCKY, ex rel
DEPARTMENT FOR NATURAL RESOURCES
AND ENVIRONMENTAL PROTECTION, et al., APPELLANTS,

vs.

MORRIS STEPHENS, et al., APPELLEES.

APPEALS FROM FRANKLIN CIRCUIT COURT
HONORABLE SQUIRE N. WILLIAMS, JUDGE
Civil Action No. 85519

BRIEF FOR CITIZEN'S LEAGUE TO PROTECT THE SURFACE RIGHTS, INC. AMICUS CURIAE

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the herein AMICUS CURIAE BRIEF was served this 27th day of May, 1976, upon the following by mailing same, postage prepaid.

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PURPOSE OF THE BRIEF

The defendants in this action maintain that the denial of certain proposed uses of their property via the injunctive process of KRS 146.350 is in itself an unconstitutional taking of their property, and that if the Commonwealth wishes to stop them from doing as they please, it must exercise the power of eminent domain and compensate them in full before any injunction can issue against activities on the property deemed harmful to the adjoining wild river. The plaintiff, in turn, has conceded that KRS 146.230 and KRS 146.280 require the Commonwealth to eventually obtain either fee title to or easements upon all the land authorized to be included within the boundaries of a "wild river," but maintains that the Commonwealth may constitutionally enjoin activities prohibited by KRS 146.290 until such time as it can appropriate the money necessary to pay for land taken by exercise of eminent domain. We fundamentally disagree with both of these positions and maintain that the entirety of the Wild Rivers Act constitutionally authorizes the Department of Natural Resources and Environmental Protection [Hereinafter DNREP] through the office of the Attorney General to permanently enjoin certain prohibited activities on private property which adjoins designated "wild rivers" for the protection of the general welfare of the Commonwealth. It is the purpose of this brief to support this argument.[1]

It is our hope that this brief will be read as the one that best represents the people of Kentucky, for whom the Wild Rivers system was established.

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[1] The facts of this case are set out in the pleadings and briefs of the parties and therefore will not be repeated here.

QUESTIONS TO WHICH BRIEF ADDRESSED

I. Whether the Kentucky Wild Rivers Act was intended to be an exercise of the police power to regulate private land uses as well as an authorization to use the power of eminent domain.

II. Whether the regulatory provisions of the Wild Rivers Act are constitutional in that they show a rational relationship to a legitimate state interest.

III. Whether the regulatory provisions of the Wild Rivers Act are constitutional as applied to the Defendant's properties.

IV. Whether the Circuit Court erred by not granting an injunction against defendants for violations of the Wild Rivers Act and by not determining whether a taking had occurred.

ARGUMENT I

THE KENTUCKY WILD RIVERS ACT IS AN EXERCISE OF THE POLICE POWER OF THE COMMONWEALTH TO PLACE REASONABLE RESTRICTIONS ON THE USES OF PRIVATE LANDS FOR THE GENERAL WELFARE OF ITS PEOPLE, SUBJECT ONLY TO THE FURTHER CONSTITUTIONAL RESTRICTIONS, IN INDIVIDUAL CASES, AGAINST CONSTRUCTIVE TAKINGS OF PROPERTY WITHOUT COMPENSATION OR WITHOUT DUE PROCESS OF LAW.

The Citizen's League to Protect the Surface Rights, Inc. [Hereinafter Citizens League] maintains that the trial court, the parties and the other Amicus Curiae below have all misconstrued the meaning and intent of KRS 146.200-.350. We contend that the statute intends to enable the DNREP to take two entirely different kinds of action to protect the designated wild rivers. First and foremost, the act is intended as an exercise of the police power to regulate certain uses of lands adjoining the wild rivers to the extent that is constitutionally permissable. Only then, if regulation of land uses is so onerous as to amount to a constructive taking of the property, must the Commonwealth either negotiate a purchase of fee title or a lesser interest in the land, or else exercise its power of eminent domain and take the property, paying full value therefor.

A. The Wild Rivers Act Should Be Construed As An Exercise Of The Police Power Supplemented By Authorization To Use The Power Of Eminent Domain Whenever The Regulatory Provisions Are Improper Or Inadequate.

In construing the meaning of the Wild Rivers Act, as with any other statute, this Court must first and foremost seek out the intent of the legislature. Lunsford v. Commonwealth, Ky., 436 S.W.2d 512 (1969); Wesley v. Bd. of Ed. of Nicholas Co., Ky., 403 S.W. 2d 28 (1966); Brown v. Hoblitzell, Ky., 307 S.W. 2d 739 (1958). But in seeking out that intent, the Court should look for the meaning of the statute as a whole so that the spirit and complete purpose of the statute

may be given effect. City of Owensboro v. Noffsinger, Ky., 280 S.W.2d 517 (1955); Dept. of Motor Transportation v. City Bus Co., Ky., 252 S.W. 2d 46 (1952). This Court has heretofore relied on a presumption that the legislature intends an act to be effective as an entirety, so that every part of the act must have significance and effect. George v. Scent, Ky., 346 S.W.2d 784 (1961). But this Court has also stated that it accepts the premise that where literal language contained in some parts of a statute are in conflict with the general scheme of the act, that language should surrender to the general purpose and intent of the legislature as gathered from all parts of the statute. Dept. of Revenue v. Miller, 199 S.W. 2d 622 (1947).

It is obvious that in the legislative process the battle between proponents and opponents of a new statute, such as the Wild Rivers Act, will sometimes create conflicts or ambiguities in the resultant language. This Court, in recognition of this fact, has always sought to harmonize inconsistent provisions so that a harmonious construction of the entire statute, rather than a construction that creates discord between different provisions of the act, may be obtained. Bischoff v. Hennessy, Ky., 251 S.W. 2d 582 (1952); Commonwealth v. Mullins, 296 Ky. 190, 176 S.W.2d 403 (1944). Of course, if the statute is unambiguous, the Court has no authority to write in language that isn't there. However, an ambiguity may exist despite apparently plain or simple wording if, from a consideration of the statute in its entirety, doubt arises as to its scope and application. Walker v. Felmont Oil Corp., 136 F. Supp. 584 (W.D. Ky. 1956), vacated 240 F.2d 912 (6th Cir. 1956); Griffin v. City of Bowling Green, Ky., 458 S.W.2d 456 (1970). A literal, strict construction will not be given where to do so would lead to an absurd or unreasonable result considering the purpose which the statute is intended to accomplish. Barrett v. Stephany, Ky., 510

S.W.2d 524 (1974); Ky. Mountain Coal Co. v. Witt, Ky., 358 S.W.2d 517 (1962). Certain wording may even be surplusage and unnecessary, and this Court has recognized that such wording may be deleted through construction to prevent an absurd consequence or to resolve ambiguity in order to carry into effect the spirit, purpose and intent of the lawmakers. City of Owensboro v. Noffsinger, supra; Asher v. Stacy, 299 Ky. 476, 185 S.W. 2d 958 (1945).

With these concepts of statutory interpretation clearly in mind, let us now look at the Wild Rivers Act as a whole to see what it intends to accomplish. After the citation provision, KRS 146.200, and the definitions sections, KRS 146.210, the legislature provided a section spelling out the intent of the whole act. KRS 146.220 reads:

> The general assembly hereby recognizes that certain streams of Kentucky possess outstanding and unique scenic, recreational, geological fish and wildlife, botanical, historical, archaeological and other scientific, aesthetic, and cultural values. It is the policy of the general assembly to complement dam construction and developments projects on Kentucky watercourses with other equally important and beneficial uses of our water resources. Therefore, it is hereby declared that in order to afford the citizens of the Commonwealth an opportunity to enjoy natural streams, to attract out of state visitors, to assure the well being of our tourist industry, to preserve for future generations the beauty of certain areas untrammeled by man, it is in the interest of the Commonwealth to preserve some streams or portions thereof in their free flowing condition because their natural, scenic, scientific, and aesthetic values outweigh their value for water development and control purposes now and in the future. For aesthetic, as well as ecological reasons, the foremost priority shall be to preserve the unique primitive character of those streams in Kentucky which still retain a large portion of their natural and scenic beauty, and to prevent future infringement on that beauty by impoundments or other manmade works. Since the stream areas are to be maintained in a natural state, they will also serve as areas for the perpetuation of Kentucky's wild fauna and flora. Few such streams remain in the eastern portion of the United States, and the general assembly feels a strong obligation to the people of Kentucky to preserve these remnants of their proud heritage. It is the purpose of K.R.S. 146.200 and 146.350 to establish a wild rivers system by designating certain streams for immediate inclusion in the system and by prescribing the procedures and criteria for protecting and administering the system. It is not the intent of K.R.S. 146.200 to 146.350 to require or to authorize acquisition of all lands or

> interests in lands within the exterior boundaries of the stream areas but to assure preservation of the scenic, ecological and other values and to provide proper management of the recreational, wildlife, water and other resources.

Clearly the legislature is recognizing a public interest in the preservation and protection of unique parts of Kentucky's natural resources for the general welfare of all the people. We would emphasize for the court's attention parts of the last two sentences in particular:

> It is the purpose of K.R.S. 146.200 to 146.350 (i.e., the whole statute) to establish a wild rivers system by . . . prescribing procedures . . . for protecting . . . the system. It is not the intent of K.R.S. 146.200 to 146.350 to require or to authorize acquisition of all lands or interests in land . . . but to assure preservation of the scenic, ecological and other values and to provide proper management of the recreational, wildlife, water and other resources.

It is submitted by the Citizens League that this is a clear expression of a desire by the legislature to use its police power in a reasonable way to protect these unique areas. If it were the legislature's purpose to purchase all the private lands within the authorized boundaries, the last sentence quoted above is ridiculous. Not intending to buy all the lands or interests therein, the legislature must have been contemplating reasonable land use regulations under the state's police power.

Much has been made by the defendants of the last sentence of the next section, KRS 146.230. The section lists the criteria for determining whether a stream is appropriate for inclusion in the wild river's system, then concludes by saying:

> Within the boundary areas set forth in KRS 146.250, lands adjacent to these streams that are not already in state or other public ownership shall be protected by acquisition of fee title or by scenic easements to the full extent necessary to preserve a true primitive environment in its pristine state. (Emphasis added)

Properly taken in the context of the preceding section, this sentence does no more than say that where police power regulations are inadequate or improper, acquisition of easements or fee title becomes necessary to complete protection of the pristine area. Since the legislature has already declared its intent not to buy all the lands adjoining the wild rivers, this is the only proper construction of the sentence. If it were not contemplated that the adjoining lands were to be protected by reasonable police power regulations, the sentence might simply have ended after the word "easements." That would have made abundantly clear an intent that the state simply buy all the private lands within the authorized boundaries and be done with it.

But the statute clearly contemplates police power regulations of land use. KRS 146.290 "lays down the law" as to what can and cannot be done on private lands within the authorized boundaries of a wild river:

> Land uses to be allowed within the exterior boundaries of a designated stream area shall be as follows:
>
> No new roads or buildings shall be constructed. Utility lines or pipelines shall not be constructed unless approved by the Commissioner in writing and under provision that the affected land be restored as nearly as possible to its former state. This provision, however, shall in no way affect the rights between a landowner and a utility company or pipeline company. There shall be no mining, and select cutting of timber shall be allowed only pursuant to regulations issued by the commissioner. All land disturbances, including instream disturbances such as dredging, shall be prohibited. Except for the management agency, access shall be by foot, horseback, canoe, boat or other non-mechanical modes of transportation. If there are existing agricultural areas within the boundaries of the area, such areas may continue to be used for agricultural purposes.

It must be emphasized that at this point it is irrelevant whether the above regulations are constitutional. That they indeed are constitutional will be discussed below. For now we are concerned only with what the legislature was

intending to do via the Wild Rivers Act, and we submit that it was clearly intending to impose land use regulations upon private lands adjoining the wild rivers for the general welfare of the public to the extent constitutionally permissible.

But it is equally clear that the legislature contemplated buying lands or interests therein where land use regulations were either inadequate to protect the area or else would be unconstitutional as to a given property owner because they would amount to a constructive "taking." After designating certain streams to be part of the system (KRS 146.240), providing for establishment of boundaries (KRS 146.250), providing a mechanism for designating future wild rivers (KRS 146.260), and providing for administration by the DNREP (KRS 146.270), the statute authorizes and empowers the department to acquire lands or interests therein by essentially any legal means, including exercise of the rights of eminent domain:

> 146.280. Acquisition of stream areas by commissioner of the department for natural resources and environmental protection.
>
> (1) Within the exterior boundaries of a designated stream area, as established and authorized by the Kentucky general assembly, the commissioner of the department for natural resources and environmental protection is authorized and empowered to acquire by purchase, exercise of the rights of eminent domain, grant, gift, devise or otherwise, the fee simple title to, a scenic easement on, or any acceptable lesser interest in any lands, and by lease or conveyance, contract for the right to use and occupy any lands. Where property within such boundaries is owned by the federal government, the commissioner can enter into agreements with the land-owning agency concerning use of the property consistent with the objectives of K.R.S. 146.200 to 146.350. Nothing in K.R.S. 146.200 to 146.350 shall be construed to deprive a landowner of his property or any interest or right therein without just compensation.
>
> (2) The commissioner is authorized to exercise the right of eminent domain only where it is absolutely necessary in order to acquire access points or to maintain the character of the area within the meaning of K.R.S. 146.200 to 146.350. The commissioner shall not obtain an easement if the landowner objects thereto, but in such case must obtain fee title, with full compensation to the landowner.

> (3) The commissioner of the department for natural resources and environmental protection may not exercise authority to acquire lands or interests in lands located within any incorporated city, village, or county when such entities have in force a duly adopted, valid ordinance or plan for the management, zoning and protection of such lands in accordance with the provisions of K.R.S. 146.200 to 146.350.

Much has been made by the defendants of the last sentence of KRS 146.280(1). They claim, and the plaintiff DNREP even concedes, that this sentence mandates that the department pay persons in defendants' situation for every conceivable use of their lands denied them under KRS 146.290 and its enforcement provisions, KRS 146.350. But once again a sentence has been taken out of context and without appreciation for the full intent of the legislature.

First of all, the sentence is immediately followed by KRS 146.280(2) which contemplates exercise of the right of eminent domain "only where it is absolutely necessary in order to acquire access points or to maintain the character of the area within the meaning of KRS 146.200 to 146.350". (emphasis added). If the prior sentence mandates payments whenever any use of lands is denied, this would amount to a use of eminent domain any time a use were denied and eminent domain would, de facto, always be "necessary". It is submitted that the interpretation of the last sentence of KRS 146.280(1) adopted by the parties fundamentally conflicts with KRS 146.280(2) and should be rejected. It is also in fundamental conflict with the statement of intent in KRS 146.200 to not require acquisition of all the lands or interests in lands within the exterior boundaries of the stream areas, and with the declaration in KRS 146.230 that land acquisition shall occur only "to the full extent necessary to preserve a true primitive environment in its pristine state." These are conflicts, or at the very least, ambiguities, and it is incumbent upon this Court to resolve them by seeking a harmonious interpretation

of the whole statute that will give effect to the totality of the legislative intent, and which will avoid an absurd or unreasonable result. Bischoff v. Hennessy, supra, Walker v. Felmont Oil Corp.; supra, Griffin v. Bowling Green, supra, Barrett v. Stephany, supra. To adopt the interpretation of the parties and of the court below would make the land use control provisions (KRS 146.290) superfluous because it is certain that the state can regulate the lands it owns, and it would leave the state powerless against developmental pressures to prevent destruction of public interests in the wild rivers and their environs except where a biennial budget fortuitously appropriates money for extensive land purchases. We urge this Court to agree that the Wild Rivers Act must be interpreted to have both a police power stick as well as a financial carrot for use when the stick is unconstitutionally forbidden.

A second argument against interpretation of KRS 146.280(1) to require compensation for any use of lands denied under KRS 146.290 is that the final sentence of the subsection contemplates only the recognized estates or ownership interests in land, and since these interests can never be taken by the state without compensation, Folger v. Commonwealth, Ky., 330 S.W. 2d 106 (1960), City of Ashland v. Price, Ky., 318 S.W. 2d 861 (1959); Shipp v. Louisville and Jefferson Co. Air Bd., Ky., 431 S.W. 2d 867 (1968), cert. denied 393 U.S. 1088, the sentence is mere surplussage that can be ignored. See City of Owensboro v. Noffsinger and Asher v. Stacy, supra. Contrary to the exhortations of the defendants, private property rights have never been held so sacred by this Court or any other American court that they would stop the state from imposing reasonable land use regulations for the health, safety, morals or general welfare of the community. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); Euclid v. Amber Realty Co., 272 U.S. 365 (1926); Goldblatt v. Town of Hempstedd, N.Y., 369 U.S. 590 (1962); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); Fowler v. Obier, 224 Ky. 742, 7

S.W.2d 219 (1928); Department for Natural Resources and Environmental Protection v. No. 8 Ltd. of Virginia, Ky., 528 S.W.2d 684 (1975).

Of course these cases and innumerable others recognize that even if legitimate land use regulations become so onerous that ownership of fee title or estates in the land are worthless, there is a constructive "taking" akin to eminent domain and compensation must be paid. Again, whether this is true in the case at bar is a question we will address later. The important point for now is what the legislature had in mind in the last sentence of KRS 146.280(1).

Although it is generally presumed by this Court that the legislature is cognizant of the Constitution, Cook v. Ward, Ky., 318 S.W. 2d 168 (1964), it is no secret that many legislators have only vague or rudimentary understanding of constitutional law. This Court is undoubtedly also aware of the constant battle between those philosophical factions within each legislature which battle over the propriety of more government regulations vs. fewer government regulations, and the battle is nowhere more heated than where constraints on the use of private property are proposed.

But it is well established that there is no way the state could constitutionally take away a fee simple estate, a life interest, an easement or a leasehold or any other recognized "estate" or "interest" or "property right" in land without compensating the owner. This is separate and distinct from denying the owner of an estate or interest some use of his land by a legitimate exercise of the police power. Thus, in City of Shively v. Ill. Central R.R. Co., Ky., 349 S.W.2d 682, 685 (1961), this Court said:

> As a general proposition a valid exercise of the police power resulting in expense or loss of

> property is not a taking of property without due process of law or without just compensation, nor does it abridge the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

To many legislators this distinction is undoubtedly not clear, and it is quite possible that the final sentence of KRS 146.280(1) was added simply to satisfy critics of the bill who wanted to have spelled-out what the constitution already requires. Interpreted in this way, the sentence is but a restatement of the well-developed constitutional law and is in no way a demand that the state pay for every exercise of its police power. The sentence is superfluous and adds nothing to the context of the entire statute, which is intended to be both a regulatory statute and a statute which enables the use of eminent domain by DNREP.

It is significant, we maintain, that the word "use" nowhere appears in the last sentence of KRS 146.280(1). By implication then, the legislature recognizes that the uses to be denied via KRS 146.290 are to be denied under the police power, and KRS 146.280(1) in no way demands that these denied uses be compensated. Again, the fact that the statute is a proper exercise of the police power, and that denial of certain uses is ultimately constitutional as to the present defendant's property will be discussed later. For now it is appropriate to recall this Court's most recent recognition that the state must have extensive powers to affect uses of private lands. In Department for Natural Resources and Environmental Protection v. No. 8 Ltd. of Virginia, supra at p. 685. Justice Lukowsky, speaking for a unanimous court said:

> Article 1, Section 10(1) and Amendments 5 and 14 of the Constitution of the United States and Sections 13, 19 and 242 of the Constitution of the Commonwealth of Kentucky provide that . . . private property may not be taken for a public use without just compensation. However, government could hardly go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law . . . .

Although the court immediately noted that these powers are limited by other provisions of the United States and Kentucky constitutions, including the "due process" clauses, the statement is in accord with the basic view of all American jurisdictions. The Citizens League maintains that the totality of the Wild Rivers Act is an exercise of these police powers to regulate certain land uses as well as a statute enabling DNREP to use the power of eminent domain. The superfluous last sentence of KRS 146.280(1), which does not demand state compensation for uses denied by KRS 146.290, should not be allowed to stand in the way.

A further argument against the interpretations of the Wild Rivers Act adopted by the parties and by the court below lies in a consideration of what kind of statute this is, and what it is trying to accomplish in today's world, where both the federal and state governments are increasingly exercising their powers to meet the rising public demands for protection and enjoyment of the remaining vestiges of North America's wild river heritage. This Court has frequently recognized that the context, character and nature of a statute should be considered in reaching a correct interpretation of its language. Folks v. Barren County, 313 Ky. 515, 232 S.W.2d 1010 (1950); Green v. Moore, 281 Ky. 305, 135 S.W. 2d 682 (1940). This court has also repeatedly adhered to the concept that contemporary circumstances must be considered in seeking legislative meaning. Brown v. Hoblitzell, Ky., 307 S.W.2d 739 (1958); City of Owensboro v. Noffsinger, supra; Hamilton v. International Union of Operating Engineers, Ky., 262 S.W. 2d 695 (1954). It is to the contemporary context of the Wild Rivers Act that we now turn our attention.

In addition to the widespread federal programs for the protection of the nation's air and water under the federal commerce power, essentially all the states have created growing, constantly evolving and often innovative programs

under the police powers to further the protection of public rights in the natural world. At least one state has even rewritten its constitution to declare unequivocally the public right to a clean environment and particularly their rights in all the waters of the state, and to mandate that the legislature protect those rights. Montana Constitution of 1972, Article IX, Section 3. While the Kentucky Constitution has no such clear mandate, the Kentucky legislature has repeatedly used its police power to follow and sometimes lead the trend among the states to protect and enhance the environment. Thus we have statutes to protect air quality (KRS 224.320 to .450); water quality (KRS 224.060, .071, .073, .109 etc.), to require noise abatement (KRS 224.065 and 224.710 to .825), to regulate locations of landfills and junk yards (KRS 224.250 to .265, 224.855 to .900 and 177.905-.990), to control location of highway billboards (KRS 177.830 to .890), to protect fish and wildlife from over-exploitation (KRS 150.010 to .992), to require reclamation of surface mines (KRS 350.010 to .990) and to enable the units of local government to enact zoning ordinances for a broad range of public purposes, including protection of ". . . natural resources, and other specific areas of the planning unit which need special protection by the planning unit." (KRS 100.201). All of these statutes recognize that the general welfare of the people is enhanced by a clean, productive, beautiful, and balanced natural environment, and that the state is, in effect, a trustee of the natural environment for the benefit of its people both now and in the future. Also, in all of these statutes, certain uses of private lands are directly or indirectly restricted for the benefit of all the people. Wherever facially challenged, this Court has upheld the constitutionality of all of these statutes even when the only interest sought to be protected was patently public aesthetics. Jasper v. Commonwealth, Ky., 375 S.W.2d 709 (1964). We maintain that the Wild Rivers Act is but an innovative extension of the long

line of legislative programs to use its police powers and, where necessary, its power of eminent domain, to protect a legitimate public interest and to meet the growing public demand for river-oriented recreational opportunities.

We are certain that the Court is well aware of the enormous industry that has developed in the production, maintenance and rental of canoes, kayaks, rafts, fishing gear and other equipment for the growing interest in "whitewater" and other natural river recreation experiences. cf. Rich, Managing Recreational Rivers, 8 Akron L. Rev. 1 (1974); Biggs, Recreational Use of Texas Rivers - Recommendations for Adoption of the Texas Public Rivers Act, 7 St. Mary's L.J. 575 (1975).

Several states have taken legislative steps to protect and enhance the public interest in this type of recreation. Most of the statutes which we are aware of have chosen to use some degree of the police power to regulate uses of private lands adjoining designated rivers, often in combination with exercises of the power of eminent domain. (See Appendices 1 - 12) for full texts of the river protection statutes of Tennessee, Wisconsin, New York, California, Minnesota, Michigan, Georgia, Oregon, Washington, Ohio, North Carolina, Connecticut.

Some of these statutes are clearly and strongly designed to rely primarily on the police power. The New York statute (Appdx. 1) calls upon one of two state agencies to make and enforce land use regulations directly (§15-2709) and outlines specific uses which shall be allowed or prohibited. In this regard we maintain it is clearly parallel to §146.270 and 146.290 of the Kentucky Wild Rivers Act. Importantly, the demand to use eminent domain is made only where an existing use is ordered by the state to be discontinued. The Tennessee statute (Appdx. 2) is in many ways similar to that of New York. Section 11-1406 calls for state-created regulations and management plans and §11-1411 spells out certain land

uses denied or permitted. Sections 11-1409 and 1410 allow but do not demand acquisition by power of eminent domain.

In Wisconsin (Appdx. 3), Connecticut (Appdx. 4), Minnesota (Appdx. 5) Washington (Appdx. 6) and Michigan (Appdx. 7), the respective acts call upon local governments to enact zoning ordinances within boundaries of either designated rivers or near any navigable lake or river. The local ordinances must comply with a state-created comprehensive plan for a given river, and in all of these states local governments will have zoning ordinances forced upon them if they refuse to comply or fail to comply with state protection criteria. Perhaps more than any other state, Wisconsin recognizes that all the state's navigable waters are held in trust for the public (Appdx. 3, §144.26(1)). The Wisconsin Supreme Court has upheld the constitutionality of its Navigable Waters Protection Law. Just v. Marinette Co., 56 Wis. 2d 7, 201 N.W. 2d 761 (1972). This case will be discussed at length below.

The Oregon statute (Appdx. 8) is a very weak use of the police power to delay developments up to one year while the state negotiates a use of the land by the owner which is harmonious with the river area management plan desired by the state. After one year, if no agreement is reached, the developer can proceed unless the state exercises the power of eminent domain and buys the land to be developed. Even this approach, which is far less onerous than a typical zoning ordinance, was attacked as an unconstitutional taking in an inverse condemnation action in Scott v. State of Oregon, 541 P.2d 516 (Or. App. 1975). But the Oregon Court of Appeals upheld the statute, concluding first by finding, at 519, that the regulatory provisions of the act were clearly separate from the provisions giving the state the right to acquire interests in adjacent lands, and then saying at 521: "We hold that the

regulatory powers given the state under the Scenic Waterways Act do not constitute a taking of the land regulated" (Emphasis added). More will be said about this important case in the third part of this argument.

Georgia, North Carolina and Ohio are the only states we know of which have natural river system statutes with essentially no police power provisions. Section 17-905(a) of the Georgia Scenic Rivers Act of 1969 (Appdx. 9) prohibits dams and the like without authorization by the General Assembly, but beyond that it is clear that the only way the state is authorized to protect lands adjoining a "scenic river" is to obtain ". . . by purchase, gift, grant, bequest, devise, lease or otherwise fee title or any lesser interest in the land lying within the authorized boundary of such river . . ." Section 17-905(b).

The North Carolina Natural and Scenic Rivers Act of 1971 (Appdx. 10) also envisions land acquisition as the only route for state regulation of river shorelands. Only one river has ever been placed into the system (§113A-35.1) and sections 113A-36, 113A-38 and 113A-41 clearly envision land acquisitions by voluntary sales, gifts, bequests, or the use of eminent domain, if and when monies are available from the legislature or from federal grants.

Ohio goes to the extreme of specifically stating that: "Declaration by the director that an area is a wild, scenic or recreational river area does not authorize the director or any government agency . . . to restrict the use of land by the owner thereof. . . or to enter upon such land." Paiges Ohio Revised Code Supp. 1974 §1501.16 (Appdx. 11).

Section 1501.18 of the Ohio statute clearly envisions only land acquisition to set up the system, using state and federal monies as they become available.

None of the three statutes just mentioned have language that even remotely resembles the regulatory language of the Kentucky Act or that of the other statutes mentioned above. These acquisition-oriented statutes accentuate very clearly the difference between a statute designed to have extensive police-power provisions versus one calling simply for land purchases or for receiving gifts and the like. They prove, we maintain, that the Kentucky legislature must have sought by KRS 146.200 to 146.350 to protect by its police power the lands adjoining designated wild rivers while retaining the option to condemn and pay for the land where regulations would not or could not work.

Of the statutes we have seen, only the California Wild and Scenic Rivers Act (Appdx. 12) seems as confused as the Kentucky Wild Rivers Act. In the California Act, §§5093.58 to 5093.60 seem to clearly contemplate police power regulations to implement a management plan, and the use of local government police powers is implied in §5093.61. But §5093.63 is very similar to the disputed last sentence in KRS 146.280(1). It reads as follows:

> Nothing in this chapter shall be construed to permit or require the reservation, use or taking of private property for scenic, fishery, wildlife or recreation purposes, for inclusion in the system or for other public use, without just compensation.

Here the word "use" appears, whereas it is not to be found in the last sentence of KRS 146.280(1). If this wording were found in the Kentucky act perhaps the defendants in this action would have a stronger case for the statutory interpretation adopted by Judge Williams, but it does not. Given the strong police power overtones of §§5093.58 to 5093.60 of the California act, even the word "use" in §5093.63 appears intended only to accentuate a desire by the California legislature to spell out the fact that the public rights in the wild rivers would not give persons a right to trespass on

private lands even though regulated by the state, nor allow the state to take possession of private lands for public use without using the power of eminent domain. Unfortunately, the Supreme Court of California has not had occasion to interpret this section, which was enacted in 1972, the same year the Kentucky Act was enacted.

There is one final argument which we believe supports our position that the 1972 Wild Rivers Act was intended to be primarily an exercise of the police power for land-use regulation, coupled with the power of eminent domain to be used when necessary. The 1976 General Assembly, prompted by the decision of the Franklin Circuit Court, has amended the Wild Rivers Act to make clear beyond peradventure what its intent is and, we submit, always has been. Senate Bill No. 309, signed into law on March 29, 1976, to become effective June 19, 1976, adds the following language to KRS 146.220:

> It is the intent of KRS 146.200 to 146.350 to impose reasonable regulations as to the use of private and public land within the authorized boundaries of wild rivers for the general welfare of the people of the Commonwealth, and where necessary, to enable the department to acquire easements or lesser interests in or fee title to lands within the authorized boundaries of the wild rivers, so that the public trust in these unique natural rivers might be kept.

The Legislature also amended the questionable last sentence of KRS 146.280(1) as follows:

> Nothing in <u>this Act</u> [KRS 146.200 to 146.350] shall be construed to deprive a landowner of the fee simple title to or lesser interest in his property [or any interest or right therein] without just compensation.

The brackets indicate language from the old statute which is being deleted, whereas the underlined words are new.

The two amendments quoted, when read together, are clearly in line with our assertions, supra, that the legislature intended to use its police power to the extent constitutionally permissible, and that the last sentence of KRS 146.280(1) is nothing more than a restatement of constitutional law.

The legislature went on to amend the land use restriction section, KRS 146.290 to make more clear what is allowed and what is not, to provide a mechanism for land use permits where required, to spell out the Secretary's authorized choices of action, and to provide a mechanism for landowners to challenge decisions of the Secretary. The revised section reads as follows:

> (1) The provisions of this section shall not apply to those uses existing at such time as a stream is included in the system.
>
> (2) Land uses to be allowed within the [exterior] boundaries of a designated stream area shall be as follows:
>
> New [No new] roads, structures, or buildings may [shall] be constructed only where necessary to effect a use permitted under the other provisions of this Act. Utility lines or pipelines may [shall not] be constructed as [unless] approved by the secretary in writing and under provision that the affected land be restored as nearly as possible to its former state. This provision, however, shall in no way affect the rights between a landowner and a utility company or pipeline company. There shall be no strip mining as defined in KRS 350.010, and select cutting of timber or other resource removal and agricultural use, may [shall] be allowed [only] pursuant to regulations promulgated [issued] by the secretary upon the granting of a permit under the other provisions of this Act. All [land disturbances, including] instream disturbances such as dredging, shall be prohibited. Except for the management agency and any existing uses which do not conform to the purposes and intent of this Act, travel upon a wild river or any public lands within the designated boundaries thereof, [access] shall be by foot, horseback, canoe, boat or other nonmechanical modes of transportation. If there are existing agricultural areas within the boundaries of the area, such areas may continue to be used for agricultural purposes.
>
> (3) Any landowner within the boundaries of the area may apply to the secretary for a change of use to permit the select cutting of timber, a resource removal or an agricultural use upon his property located within the area and the secretary shall hold a public hearing after public notice on the application within sixty (60) days. The landowner or any interested person shall be allowed to present evidence as to whether the proposed use by the applying landowner are in accordance with the management plan

> developed pursuant to KRS 146.270, the purpose and intent of the Wild Rivers Act as expressed in KRS 146.220, and other applicable law.
>
> (4) The secretary shall, within sixty (60) days, after said hearing, either:
>
> (a) Issue an order, with accompanying opinion, denying the permit; or
>
> (b) Issue an order, with accompanying opinion, granting the permit with such restrictions, terms and conditions as are appropriate to protect to the fullest extent possible the wild rivers area and the public trust therein within the intent of KRS 146.220; or
>
> (c) Recommend an alternate use to which the land may be put under this Act which is more consistent with the purpose and intent of this Act than the use for which application was made.
>
> (d) Institute condemnation proceedings in the circuit court of the county in which the land is located, or else negotiate a purchase of the land affected, or any interest therein.
>
> (5) On or before thirty (30) days from the date of the secretary's ruling, the landowner may file with the department a written objection to the ruling. If, within the next sixty (60) days the landowner and the secretary are unable to reach an agreement with respect to a modification of his ruling, the secretary must either permit the use applied for, condemn the property, or petition the Franklin Circuit Court for an order restraining the proposed use. The order shall be entered immediately upon the filing of the petition and the execution of a bond without surety by the Commonwealth in an amount satisfactory to the court to indemnify the landowner against loss of profits from any wrongful restraint of the use of his property during the period from the filing of the petition until such time as the matter is included by the courts. The court shall review the decision as to both law and fact; but no factual finding shall be reversed unless clearly erroneous or else arbitrary, capricious, or an abuse of discretion.

This is clearly only an elaboration and refinement of the preexisting law that has been misinterpreted by the parties and by the court below, once again showing our interpretation of the statute to be the correct one.

To recapitulate, the Kentucky Wild Rivers Act must be interpreted primarily as an exercise of the police power to reasonably regulate land uses, within the boundaries of designated wild rivers. Coupled with this regulatory power

is the grant of the power of eminent domain to enable the DNREP to take lands or less than fee interests therein whenever it is better to do so from a management perspective or necessary to do so because, as to the given property owner, regulations would amount to a constructive taking of property without compensation.

This interpretation should be reached because: (1) to fail to do so would render much of the management language of the statute superfluous and meaningless, amounting to an absurd result; (2) the legislative intent should be derived from the statute as a whole, reconciling ambiguities and conflicts which detract from the overall intent to regulate land uses to protect the river vestiges of Kentucky's past; (3) the Act calls for use of the power of eminent domain only where "absolutely necessary" (KRS 146.280(2)), yet the construction adopted by the court below could require exercise of eminent domain every time a land use is denied by the state. If the legislature had intended such an absurd result it would have simply authorized the purchase of all the lands within the contemplated wild rivers areas and have been done with it; (4) the last sentence of KRS 146.280(1) is mere surplussage that only restates prevailing constutional law and is intended to add nothing of substance to the statute. The sentence does not demand that the state compensate landowners every time some use of their land is denied by DNREP; (5) the Kentucky Wild Rivers Act is closely analagous to "Wild rivers" acts of several other states which are more clearly designed to be exercises of the police power with or without authorizations to use the power of eminent domain; (6) the amendments to the Wild Rivers Act adopted by the 1976 regular session of the General Assembly make abundantly clear that the intent of the 1972 Act was to have been as here argued, contrary to the interpretations given by the Franklin Circuit Court and by the parties below.

B. The Land Use Regulation Provisions Of The Kentucky Wild Rivers Act Have A Rational Relationship To The Legitimate State Interest In Promoting The General Welfare By Protecting Our Natural Heritage Of The Wild Rivers And By Protecting An Aesthetic Environment.

To be a constitutional exercise of the police power within the fifth and fourteenth amendments to the United States Constitution, a statute must be rationally related to some legitimate government interest. In particular,

> . . . it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable having no substantial relation to the public health, safety, morals, or general welfare.

Euclid v. Amber Realty Co., 272 U.S. 365,395 (1926).

The Euclid principle has been repeatedly reaffirmed by the United States Supreme Court, Goldblatt v. Town of Hempstead, N.Y., supra; Village of Belle Terre v. Boraas, supra, and it has been adopted by this Court as the proper test under the Kentucky Constitution as well. Department for Natural Resources and Environmental Protection v. No. 8 Ltd. of Virginia, supra; Jasper v. Commonwealth, supra.

The Kentucky Wild Rivers Act is conspicuously and rationally related to the interest of protecting certain unique natural resources for the aesthetic enjoyment and general welfare of the people of Kentucky both now and in the distant future. That aesthetics are a legitimate government interest should be beyond doubt in this Court, considering its holding in Jasper v. Commonwealth, supra.

In Jasper, which was a constitutional challenge to the "Junk Yard Act," (KRS 177.905 to .990) it was said:

> The obvious purpose of this Act is to enhance the scenic beauty of our roadways by prohibiting the maintenance of unsightly vehicle graveyards

> within the view of travellers thereon. While there may be a public safety interest promoted, the principal objective is based upon aesthetic considerations. Though it has been held that such considerations are not sufficient to warrant the invocation of the police power, in our opinion the public welfare is not so limited. In Turner v. Peters, Ky., 327 S.W.2d 958, we recognized there could be a legitimate public interest in businesses which "offend the esthetics of the community" . . . .
>
> A recent case on this point is People v. Stover, 12 N.Y.2d 462, 240 N.Y.S.2d 734, 191 N.E.2d 272. The Court of Appeals of New York examined at length the development of the law on the question of whether aesthetic considerations will support the exercise of the police power. The reader is referred to that opinion for a thorough discussion of the problem and the citation of numerous authorities. The New York court, in line with modern thinking on the subject and for reasons we consider sound, held that such considerations may justify the exercise of such power.
>
> The police power is as broad and comprehensive as the demands of society make necessary. * * * It must keep pace with the changing concepts of public welfare. . .
>
> The right to conduct a business is subordinate to the police power of the state reasonably exercised in the public interest. * * * The real question is whether in the light of current conditions the Act constitutes a reasonable regulation of appellants' business in the furtherance of a substantial public purpose.
>
> The policy to be followed in promoting the public welfare is a legislative matter. If there is a legitimate basis for the policy, the courts may not question it. * * * In our opinion there was a real and substantial justification for adoption of some regulative policy with respect to the conduct of this kind of business enterprise. Our only other inquiry is whether the form of regulation was reasonable. Since it goes no further than to effectuate an authentic public purpose, we cannot find it arbitrary or unreasonable. Consequently we cannot say that there has been a violation of appellants' constitutional rights. (Footnotes omitted).

This Court has continued to apply this view of the law, Moore v. Ward, Ky., 377 S.W.2d 881 (1964), a view increasingly shared by other state courts. Scott v. State of Oregon, supra, Matter of McCormick v. Lawrence, 372 N.Y.S. 2d 156 (N.Y.S. Ct. 1975); John Donnelly & Sons, Inc. v. Outdoor Advertising Board, 339 N.E. 2d 709 (Mass. 1975); Westfield Motor Sales Co. v.

Westfield, 129 N.J. Super. 528 (1974); State v. Diamond Motors, Inc., 50 Hawaii 33, 429 P.2d 825 (1967).

Considering the modern recognition of the importance of protecting certain of our unique natural stream valleys from degradation by unregulated private interests, so that biological diversity and aesthetically pleasing natural retreats along the public waterways might be maintained, the legislature obviously was reasonably promoting a legitimate state interest by enacting the regulatory provisions of the Wild Rivers Act. Following the reasoning of the New Jersey Supreme Court, the Kentucky legislature

> . . . has not only a right to protect its own resources, but also the duty to do so. . . . [T]here resides in each of the several states a power to protect its natural resources. . . .

Hackensack Meadowlands Comm. v. Municipal Authority, 348 A.2d 505 (N.J. 1975).

The eight rivers sought to be protected by the Wild Rivers Act are recognized to be extremely valuable to mankind because of their rich acquatic and terrestrial ecosystems and because of their outstanding geological features. The Kentucky legislature had not only the right but arguably the duty to restrict human activities that might destroy these resources. The Wild Rivers Act therefore cannot be facially invalid because it is a reasonable and rational approach to the protection of these unique resources.

C. Regulation Of The Uses Of The Defendant's Lands Under The Wild Rivers Act Is Unconstitutional Only If, As To The Defendants, The Regulations Amount To A Constructive Taking Of Their Property For Public Use Without Compensation Or Without Due Process Of Law.

We have demonstrated that the Wild Rivers Act is an attempt to exercise the state's police power and that it is

facially valid because it is rationally related to a legitimate state interest. We recognize, however, that the statute could still be unconstitutional under the fifth and fourteenth amendments as applied to the defendants if it amounted to a constructive taking of their property. Pennsylvania Coal Co. v. Mahon, supra, Euclid v. Amber Realty Co., supra, Goldblatt v. Town of Hempstead N.Y., supra, Morris County Land L Co. v. Parsippany-Troy Hills Tp., 40 N.J. 539, 193 A.2d 232 (1963), State v. Johnson, 265 A.2d 711 (Me. 1970); MacGibbon v. Board of Appeals, 356 Mass. 635, 255 N.E.2d 347 (1970), Just v. Marinette Co., supra, Scott v. State of Oregon, supra, Sands Point Harbor v. Sullivan, 136 N.J. Super. 436, 346 A.2d 612 (1975); Turnpike Realty Co. v. Town of Dedham, 72 Mass. 1303, 284 N.E. 2d 891 (1972); In Re Spring Valley Development, 300 A.2d 736 (Me., 1973).

But the property owners have the burden of showing that the attempted regulation restrains them in such an onerous way that their property has been rendered virtually valueless to them. Thus, in Goldblatt, supra, the Supreme Court said at 369 U.S. 594 :

> . . . There is no set formula to determine where regulation ends and taking begins. Although a comparison of values before and after is relevant, see Pennsylvania Coal Co. v. Mahon, supra, it is by no means conclusive, see Hadacheck v. Sebastian, supra, [239 U.S. 394 (1918)], where a dimunition in value from $800,000 to $60,000 was upheld. How far regulation may go before it becomes a taking we need not decide, for there is no evidence in the present record which even remotely suggests that prohibition of further mining will reduce the value of the lot in question. Indulging in the usual presumption of constitutionality, . . . we find no indication that the prohibitory effect of Ordinance No. 16 is sufficient to render it an unconstitutional taking if it is otherwise a valid police regulation.

The ordinance under attack in Goldblatt effectively stopped, for reasons of public safety and community aesthetics,

a mining operation that had been profitably operating on the property in question for many years, but it was not shown that the land was without value for other legitimate purposes.

This reasoning lay partly behind the recent decision of the California Supreme Court (en banc) which upheld a down-zoning of petitioner's land from a commercial zone, where the land was supposedly worth $400,000, to a residential zone, where it was said to be worth only $75,000. HFH Ltd. v. Superior Court of Los Angeles County, Sup., 125 Cal. Rptr. 365 (1975).

More similar to the cases at bar are the three known cases that deal with river or lake protection statutes, and the closely analogous cases involving wetlands protection statutes. A leading case is Just v. Marinette County, supra, where the Wisconsin Supreme Court upheld restrictions enacted by a local government pursuant to the Wisconsin Navigable Waters Protection Law (Appdx. 3). This statute protects all navigable waters of Wisconsin, both streams and lakes, through restrictions on shoreland development. The Justs violated the law by proceeding to place fill dirt upon wetlands they owned on the shore of a navigable lake without first seeking a conditional use permit. A mandatory injunction against this activity was upheld over arguments that a taking had occurred. The Wisconsin court first noted that:

> . . . the necessity for . . . compensation for loss suffered to an owner by police power restriction arises when restrictions are placed on property to create a public benefit rather than to prevent public harm. 201 N.E. 2d .

The Court continued:

> This case causes us to reexamine the concepts of public benefit in contrast to public harm and the scope of an owners right to use of his property. In the instant case we have a restriction on the use of a citizen's property, not to secure a benefit for the public, but to prevent a harm from the change in the natural character of the citizen's property. . . .
>
> An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others. The exercise of the police power . . . must be reasonable and we think it is not an unreasonable exercise of that power to prevent harm to public rights by limiting the use of private property to its natural uses. . . .
>
> The changing of wetlands and swamps to the damage of the general public by upsetting the natural environment . . . is not a reasonable use of that land which is protected from police power regulation. Changes . . . to some extent are permitted because the extent of such changes . . . does not cause harm. . . [N]othing this court has said or held in prior cases indicate that destroying the natural character of a swamp or wetland so as to make that location available for human habitation is a reasonable use of that land when the new use, although of a more economical value to the owner, causes harm to the general public. . . .
>
> The active public trust doctrine of . . . Wisconsin in respect to navigable waters requires the state not only to promote navigation but also to protect and preserve those waters for fishing, recreation, and scenic beauty . . . .
>
> . . . Lands adjacent to or near navigable waters exist in a special relationship to the state . . . The restrictions in the . . . ordinance upon wetlands within 1,000 feet of Lake Nequebay . . . without a permit is not confiscating or unreasonable. . . .
>
> Cases wherein a confiscation was found cannot be relied on by the Justs . . . In all these cases the unreasonableness of the exercise of the police power lay in excessive restriction of the natural use of the land or rights in relation thereto. . . .
>
> . . . Too much stress is laid on the right of an owner to change commercially valueless land when that change does damage to the rights of the public . . . .
>
> . . . The shoreland zoning ordinance preserves nature, the environment, and natural resources as they were created and to which the people have a present right. The ordinance does not create or improve the public condition but only preserves nature from the despoilage and harm resulting from the unrestricted activities of humans . . . .

By finding that the ordinance protected existing

public rights from harm rather than creating new public benefits, the court was saying that the ordinance could not go "too far" no matter how much "property value" was supposedly diminished. But the court was sensitive to the argument that the Justs must have some reasonable use of their land. The court noted, however, that the law provided for special use permits and a variety of uses as of right. The court concluded, at 770:

> The special permit technique is now common practice and has met with judicial approval, and we think it is of some significance in considering whether or not a particular . . . ordinance is reasonable.

Since the law was held reasonable, we maintain that the Just court was saying that the law must provide the opportunity for beneficial uses of the land as in a city zoning scheme, but that the owner has no absolute right to do what he pleases with the land even if it denies him the opportunity to make large profits. KRS 146.290 allows private lands to be used for all natural recreational purposes, and in addition, allows land to be used (1) for utility lines or pipelines upon approval by the Secretary, (2) for timber harvests under further regulations by the Secretary, and (3) for agricultural purposes where agriculture had already been established. Thus there is opportunity for the landowner to profit from his land, and he must show clearly the contrary before he can even talk of there being a "taking."

This was a controlling factor in Scott v. State of Oregon, supra, where the plaintiff failed to obtain a declaration that her property had been "taken" by regulations restraining her desired property use for one year while the state negotiated with her to modify her plans. This procedure was designed to protect a river designated under the Oregon Scenic Waterways Act (Appdx 8). Either party could terminate

negotiations after three months, and after one year, barring an agreement, the landowner could do as she pleased unless the state exercised its power of eminent domain. In the meanwhile, she was free to use the land as it had been before or for other, unrestricted purposes. Noting this, the court said "Under any of these possibilities, she will be able to make future beneficial use of the property. If the defendant elects to condemn, she will receive . . . compensation." 451 P.2d 521.

The Oregon Court then discussed Oregon City v. Hartke, 240 Or. 35, 400 P.2d 255 (1965), which, like Jasper v. Commonwealth, supra, adopted the view ". . . that aesthetic considerations alone may warrant an exercise of the police power." 541 P.2d at 520. The Court went on to say at 521:

> In Oregon City v. Hartke, supra, the Supreme Court upheld the constitutionality of a zoning regulation that completely excluded a common type of land use, automobile wrecking yards, from the city. In considering the issue the court said:
>
> "We hold that it is within the police power of the city wholly to exclude a particular use if there is a rational basis for the exclusion. The city commission has the responsibility for the planning and development of the city in a manner which meets the needs of the community. The commission may interpret those needs as including the elimination of uses which are not in keeping with the character of the city as it then exists or as the community would desire it to be in the future. It is not irrational for those who must live in a community from day to day to plan their physical surroundings in such a way that unsightliness is minimized. The prevention of unsightliness by wholly precluding a particular use within the city may inhibit economic growth [for] the city or frustrate the desire of someone who wishes to make the proscribed use, but the inhabitants of the city have the right to forego the economic gain and the person whose business plans are frustrated is not entitled to have his interest weighed more heavily than the predominant interest of others in the community. (Footnote omitted), 240 Or., at 49-50.
>
> This principal has equal application to the Scenic Waterways Act.
>
> We hold that the regulatory powers . . . do not constitute a taking of the land regulated. (Emphasis added).

We urge this Court to keep the language of the Oregon court in mind in assessing the validity of the stronger police-power provisions of the Kentucky Wild Rivers Act.

Consider also the holding of the Supreme Court of Essex County, New York in Matter of McCormick v. Lawrence, supra. There the Adirondack Pack Agency denied, for aesthetic purposes, permission for landowners to build boathouses on their shorefront along Oseetah Lake, which is part of the water course of the Saranac River [now designated a recreational river under the New York Statute, Appdx. 1]. The court first held the regulation to fall within the police power because aesthetics are a legitimate state interest. It then concluded:

> Lastly, having determined that the . . . Act and the . . . Agency are probably within the police powers, Petitioners may not be heard to complain that the results constitute an unlawful and unreasonable restriction in use and enjoyment of their property. (Euclid v. Amber Realty Corp. . .) Almost all zoning result in a curtailment of the use of one's property, but such restrictions are permissible to promote the general welfare. . . .

Here the court was not denying all beneficial use of the property because the Agency had approved a 32 lot development near the lakeshore, forbidding only the obtrusive boathouses along the scenic shore. Obviously the landowners were not being denied the right to use their land beneficially.

Some beneficial use of restricted land has been the key to the constitutionality of the various wetlands statutes that have appeared of late in our coastal states. Several of the early statutes, which made it impossible for landowners to have any real beneficial use of their lands were struck down. Dooley v. Town Plan & Zon. Com. of Town of Fairfield, 151 Conn. 304, 197 A.2d 770 (1964); Morris County Land I. Co. v. Parsippany-Troy Hills Tp., supra (N.J. 1963); State v.

Johnson, supra (Me. 1970); MacGibbon v. Board of Appeals, supra (Mass. 1970). But more recent statutes have been drawn with the flexibility necessary (often by special permit) to make sure that no landowner is denied all beneficial uses of his land. Both New Jersey and Massachusetts have now upheld statutes re-written after Morris County and MacGibbon, respectively. Sands Point Harbor v. Sullivan, 136 N.J. Super. 436, 346 A.2d 612 (1975); Turnpike Realty Co. v. Town of Dedham, 72 Mass. 1303, 284 N.E.2d 891 (1972). New Hampshire and Rhode Island have upheld similar statutes within the last year. Sibson v. State, 336 A.2d 239 (N.H. 1975); Mills v. Murphy, 352 A.2d 661 (R.I. 1976).

Finally, it is noteworthy that the federal judiciary continues to take a position in line with these numerous state decisions. In Smoke Rise v. Washington Suburban Sanitary Commission, 400 F. Supp.1369 (D. Md. 1975), Chief Judge Northrop approved the reasoning of Just v. Marinette County, supra, as consistent with Maryland law, and then continued:

> . . . [P]laintiff's claim for relief under the taking clause is ill founded even if this Court were to look only at the degree of the restriction on plaintiffs use of their land. As indicated by the Court in Steel Hill Development, Inc. v. Town of Sanbornton, 469 F.2d 956, 963 (1st Cir. 1972), under the modern test, no taking arises under the fifth amendment unless the property has been rendered worthless or useless. 400 F. Supp. 1382.

ARGUMENT II.

THE PERMANENT INJUNCTION DEMANDED BY THE COMMONWEALTH IS PROPER UNDER THE WILD RIVERS ACT BECAUSE THE DEFENDANTS HAVE NOT MET THEIR BURDEN OF SHOWING THAT, AS TO THEM, THE INJUNCTION AMOUNTS TO A TAKING OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

When the Citizen's League first asked leave of this Court to submit a brief Amicus Curiae we thought that the proper action for this Court to take would be to remand these cases for a determination by the trial court on whether the injunction sought by the state would be a "taking."

Further analysis of the cases, however, leads us to believe that the existing record provides sufficient basis for this Court to declare that no taking will have occurred if the injunction is allowed and the regulations enforced. If it please the Court, we will now offer our argument to that effect. If the Court believes the record is not sufficient on the issue, we urge a remand to the Franklin Circuit Court for further evidentiary proceedings.

Since the Wild Rivers Act is a legitimate attempt to exercise the police power of the state, the burden falls on the defendants to prove its unconstitutionality as applied to them. In Goldblatt v. Town of Hempstead, N.Y., supra, perhaps the classic of all "taking" cases, the U.S. Supreme Court said "Our past cases leave no doubt that appellants [the landowners] had the burden on 'reasonableness'." 369 U.S. 596. And in In re Spring Valley Development, supra, (Me. 1973) the Court said ". . . [A]ll acts of the Legislature are presumed to be constitutional . . . and . . . the burden is on him who claims that the Act is unconstitutional to show its unconstitutionality. . . ." Accord, Sands Point Harbor v. Sullivan, supra, Just v. Marinette County, supra.

There is nothing in the record of the Tombstone Junction cases to indicate that the landowners would be denied all beneficial use of their lands if they obeyed the restrictions of the Wild Rivers Act. On the contrary, the defendants conceded in their first brief in the court below, at page six, that the land has ". . . standing merchantable timber of great value." Why then, did they not apply to the DNREP for permission to harvest some of this timber as they might have done profitably under KRS 146.290? Rather than submit to the reasonable land use restrictions, the defendants moved arrogantly forward and cut trees along the protected shores of the wild river to make a fiat accompli of their plans,

admitted on the same page of the brief, to construct a motel and a tourist railroad for future pecuniary profit, ignoring the harm to the public interest in the wild Cumberland River and Cumberland Falls.

There is no showing in this case that the defendants could not use their land beneficially by building a hiking trail to their scenic bluffs overlooking Cumberland Falls, to be used by tourists from a motel that could be located on their property beyond the protected zone. And there is no showing that the owners could not profit from offering, for a fee, guided nature tours on such trails, just as private cave owners profit from guided tours. In short, these defendants have not come close to showing that their land ". . . has been rendered worthless or useless. . ." Smoke Rise, supra. Nor have they shown why they should be allowed to destroy a portion of the natural banks of the Cumberland River, to the detriment of all Kentuckians. Just v. Marinette County, supra. As in Just, these defendants need to be permanently enjoined from the unlawful acts and be made to conform to the legitimate demands of the legislature for the general welfare of all the people.

CONCLUSION AND PRAYER FOR RELIEF

The Citizens League to Protect the Surface Rights has shown: (1) that the Wild Rivers Act, properly construed, is an exercise of the police power to regulate private land uses, as well as a statute calling for limited use of the power of eminent domain; (2) that the statute is facially constitutional as a reasonable exercise of the police power to promote a legitimate state interest; (3) that the statute is unconstitutional as to the defendants only if they can

prove a "taking" and (4) that the defendants have failed to so prove.

The Citizens League therefore prays that this Honorable Court reverse the judgment of the Franklin Circuit Court and order that the Court enter a permanent injunction against the defendants' attempts to develop their property in violation of KRS 146.290. In the alternative, we pray that the case be remanded for further proof as to whether the injunction sought would amount to a taking of defendant's property without compensation.

Respectfully submitted,

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APPENDIX NO. 1

New York Wild and Scenic Rivers Act. Envir. Cons. Law §§15-2701 to 15-2723. McKinney's Consol. Laws of N.Y.; 1976 Pocket Part.

TITLE 27—WILD, SCENIC AND RECREATIONAL RIVERS SYSTEM [NEW]

Sec.

15-2701. Statement of policy and legislative findings.
15-2703. Definitions.
15-2705. Jurisdiction of the commissioner and the Adirondack park agency.
15-2707. Classes of river areas includable in system, criteria; management objectives.
15-2709. Administration of the system.
15-2711. Establishing boundaries.
15-2713. Initial designations.
15-2714. Additional designations.
15-2715. Designation of additions to the system.
15-2717. Cooperation with the federal government.
15-2719. Cooperation clause.
15-2721. Conflict with other laws.
15-2723. Penalties and enforcement.

§ 15-2701. Statement of policy and legislative findings

1. The legislature hereby finds that many rivers of the state, with their immediate environs, possess outstanding natural, scenic, historic, ecological and recreational values.

2. Improvident development and use of these rivers and their immediate environs will deprive present and future generations of the benefit and enjoyment of these unique and valuable resources.

3. It is hereby declared to be the policy of this state that certain selected rivers of the state which, with their immediate environs, possess the aforementioned characteristics, shall be preserved in free-flowing condition and that they and their immediate environs shall be protected for the benefit and enjoyment of present and future generations.

4. The purpose of this act [1] is to implement this policy by instituting a state wild, scenic and recreational rivers system, by designating the initial components of that system and by prescribing the methods by which and standards according to which additional components may be added to the system from time to time.

Added L.1973, c. 400, § 39.

[1] So in original. Probably should read "title."

Derivation. Conservation Law of 1911, c. 647, § 429-k, added L.1972, c. 869, § 1; and repealed by L.1973, c. 400, § 92.

Effective Date. Section 94 of L. 1973, c. 400, provided that this section is effective June 5, 1973.

§ 15-2703. Definitions

Except as otherwise required by the context, the following terms when used in this act [1] shall be construed as follows:

1. "Agency" means the Adirondack park agency as created by chapter seven hundred and six of the laws of nineteen hundred seventy-one, and whose functions, powers and duties are provided for in article twenty-seven of the executive law.

2. "Commissioner" means the commissioner of environmental conservation, his successors in office and any agency which may succeed to the duties of such office.

3. "Development" means any activity which materially affects the existing condition, use or appearance of any land, structure or improvement including the actual or effective division or proposed division of land into lots, parcels or sites whether contiguous or not, for the purpose of sale, lease, license or any form of separate ownership or occupancy as part of a common scheme or plan, (including any grading, road construction, installation of utilities or other improvements or any other development preparatory or incidental to any such division) by any person or by any other person controlled by, under common control with or controlling such person or by any group of persons acting in concert as part of a common scheme or plan but shall not include the division of any land resulting from bona fide devise, inheritance, gift or the lease of land for hunting and fishing.

4. "Forest Management" means forestry practices, including harvesting of a forest woodland or plantation, the construction, alteration or maintenance of wood roads, skidways, landings and fences and related research and educational activities.

5. "Free flowing" means existing or flowing in natural condition without impoundment, diversion, straightening, riprapping, or other modification of the waterway, except for stream improvement structures for fisheries management purposes expressly authorized in section 15-2709 of this chapter.

6. "Improvement" means any change in or addition to land, including but not limited to grading, filling, excavating or adding banks, fences, dikes, ditches, pipelines, poles, electrical conduits, roads, streets, curbs, gutters, sidewalks, driveways, parking lots or spaces.

7. "Motor vehicle" means a device for transporting personnel or material, incorporating a motor or an engine of any type for propulsion and with wheels, tracks, skids, skis, air cushion or other contrivance for traveling on, or adjacent to land and water or through water.

8. "Person" means any individual, corporation, partnership, joint venture, association, organization, government or any agency or political subdivision thereof, or any other entity.

9. "River" means a flowing body of water or a section, portion or tributary thereof, including rivers, streams, creeks, runs, kills, rills, branches, or lakes. "River area" means the term river and the land area in its immediate environs as established by the commissioner or the agency, but not exceeding a width of one-half mile from each bank thereof.

10. "Road" means any highway, hard-surfaced road, improved or dirt road.

11. "Stream improvement structures for fishery management purposes" means structures and improvements, including but not limited to, fish barrier dams, fish passage structures, minor diking, cribbing, bank stabilization and stream deflectors and other structures or improvements designed solely for fishery management purposes which do not materially alter the natural character of the waterway.

12. "Structure" means any object constructed, installed or parked on land to facilitate land use, such as buildings, mobile homes, sheds, signs, tanks, outdoor lighting and any fixtures, additions and alterations thereto and trailers, travel trailers, campers, or tents constructed, installed, or parked on land for other than a temporary period or for a purpose other than transient occupancy and any fixtures, additions or alterations thereto.

13. "System" means the rivers designated as wild, scenic and recreational rivers in this part.[1]

Added L.1973, c. 400, § 39; amended L.1975, c. 613, § 1.

[1] So in original. Probably should read "title."

1975 Amendment. Subd. 3. L.1975, c. 613, § 1, eff. Sept. 1, 1975, defined "development" to include division of land into parcels or sites and any grading, road construction, installation of utilities or other improvements or any other development preparatory or incidental to any division, to exclude the lease of land for hunting and fishing, substituted "by any person or by any *other person controlled by*, under common control with or controlling such person or by any group of persons acting in concert as part of a common scheme or plan", for "by *any sponsor or group of sponsors acting* in concert", and deleted "or operation of law" following "gift".

Subd. 4. L.1975, c. 613, § 1, eff. Sept. 1, 1975, added subd. 4. Former subd. 4 renumbered 5.

Subd. 5. L.1975, c. 613, § 1, eff. Sept. 1, 1975, renumbered former subd. 4 as 5 and inserted ", except for *stream improvement structures* for fisheries management purposes expressly authorized in section 15-2709 of this chapter". Former subd. 5 renumbered 6.

Subds. 6 to 10. L.1975, c. 613, § 1, eff. Sept. 1, 1975, renumbered former subds. 5 to 9 as 6 to 10. Former subd. 10 renumbered 12.

Subd. 11. L.1975, c. 613, § 1, eff. Sept. 1, 1975, added subd. 11. Former subd. 11 renumbered 13.

Subd. 12. L.1975, c. 613, § 1, eff. Sept. 1, 1975, renumbered former subd. 10 as 12, inserted: ", mobile *homes*" *following* "*buildings*", *deleted* "individual mobile homes," preceding "trailers" and substituted "parked on land for other than a temporary period or for a purpose other than transient *occupancy*" for "parked *on land* for a period in excess of six months".

Subd. 13. L.1975, c. 613, § 1, eff. Sept. 1, 1975, renumbered former subd. 11 as 13.

Derivation. Conservation Law of 1911, c. 647, § 429-*l*, added L.1972, c. 869, § 1; and repealed by L.1973, c. 400, § 92.

Effective Date. Section 94 of L.1973, c. 400, provided that this section is effective June 5, 1973.

§ 15-2705. Jurisdiction of the commissioner and the Adirondack park agency

Notwithstanding provisions of any other general or special law, the functions, powers and duties encompassed by this section shall be vested

in the Adirondack park agency as to any privately owned part of a river area within the Adirondack park as defined by law which may become part of the system; however, the commissioner shall have exclusive jurisdiction over all other river areas in the state and of all parts of river areas owned by the state located within the Adirondack park which may become part of the system. This section shall not be construed to divest the commissioner from the exercise of functions, powers and duties which have not been delegated by law to the agency. If the commissioner or the agency shall conduct any studies, proceedings or activities under this section or otherwise which affect or may affect river areas, any part of which are within the Adirondack park, they shall consult and cooperate to carry out the purposes of this title.
Added L.1973, c. 400, § 39; amended L.1973, c. 401, § 3; L.1975, c. 613, § 2.

1975 Amendment. L.1975, c. 613, § 2, eff. Sept. 1, 1975, substituted "affect" for "effect" in two instances and "title" for "part".

1973 Amendment. L.1973, c. 401, § 3, eff. June 5, 1973, inserted "other" preceding "river areas in the state."

Derivation. Conservation Law of 1911, c. 647, § 429-m, added L.1972, c. 869, § 1; and repealed by L.1973, c. 400, § 92.

Effective Date. Section 94 of L.1973, c. 400, provided that this section is effective June 5, 1973.

§ 15-2707. Classes of river areas includable in system, criteria; management objectives

1. The following types of river areas are eligible for inclusion in the system. All state agencies are hereby directed to pursue policies with respect to their respective activities, functions, powers and duties which are designated to enhance the conditions of designated rivers in accordance with the criteria set forth for such rivers in this section.

2. All rivers in the system shall be relatively free of pollution and the water quality thereof of a standard sufficiently high to meet the primary management purposes enumerated herein.

a. Wild river. Those rivers or sections of rivers that are free of diversions and impoundments, inaccessible to the general public except by water, foot or horse trail, and with river areas primitive and undeveloped in nature and with development, if any, limited to forest management and foot bridges.

(1) The minimum length of any one section shall be five miles.

(2) In general, the minimum distance from the river shore to a public highway or a private road open to the public for motor vehicle use, shall be one-half mile except where a physical barrier exists which effectively screens the sight and sound of motor vehicles.

(3) Management of wild river areas shall be directed at perpetuating them in a wild condition as defined herein.

b. Scenic river. Those rivers, or sections of rivers, that are free of diversions or impoundments except for log dams, with limited road access and with river areas largely primitive and largely undeveloped or which are partially or predominantly used for agriculture, forest management and other dispersed human activities which do not substantially interfere with public use and enjoyment of the rivers and their shores.

(1) There shall be no minimum length of any one section.

(2) Management of scenic river areas shall be directed at preserving and restoring the natural scenic qualities of such rivers.

c. Recreational river. Those rivers, or sections of rivers, that are readily accessible by road or railroad, that may have development in their river area and that may have undergone some impoundment or diversion in the past.

(1) There shall be no minimum length of any one section.

(2) Management shall be directed at preserving and restoring the natural scenic and recreational qualities of such river areas.

d. Exceptions. Limited existing exceptions to the criteria for all three classes of rivers will not automatically exclude rivers from designation. Rather, the river area shall be examined as a whole with its overall worthiness for inclusion being the deciding factor.

Added L.1973, c. 400, § 39; amended L.1975, c. 613, § 3.

1975 Amendment. Subd. 2, par. a. L.1975, c. 613, § 3, eff. Sept. 1, 1975, in opening par., inserted "and undeveloped" and "and with development, if any, limited to forest management" preceding and following "in nature" and deleted "free of man-made development except" preceding "foot bridges".

Derivation. Conservation Law of 1911, c. 647, § 429-n, added L.1972, c. 869, § 1; and repealed by L.1973, c. 400, § 92.

Effective Date. Section 94 of L. 1973, c. 400, provided that this section is effective June 5, 1973.

§ 15-2709. Administration of the system

1. The wild, scenic and recreational rivers system shall be administered in accordance with their respective jurisdictions by the commissioner or the agency according to policies and criteria set forth in this title upon establishment of the boundaries of each river area in accordance with section 15-2711 of this chapter. The commissioner or agency shall make and enforce regulations necessary for the management, protection, and enhancement of and control of land use and development in the wild, scenic and recreational river areas. No regulations shall be promulgated unless a publicized public hearing is held in the environmental conservation region encompassing the affected area by the commissioner or agency. In such administration, primary emphasis shall be given to protecting ecological, recreational, aesthetic, botanical, scenic, geological, fish and wildlife, historical, cultural, archeological and scientific features of the area. In connection with such administration, the commissioner or the agency may provide for the preparation and implementation of management plans for individual river areas or significant portions thereof.

2. After inclusion of any river in the wild, scenic and recreational rivers system, no dam or other structure or improvement impeding the natural flow thereof shall be constructed on such river except as expressly authorized in paragraphs b and c of this subdivision. Notwithstanding anything herein contained to the contrary, existing land uses within the respective classified river areas may continue, but may not be altered or expanded except as permitted by the respective classifications, unless the commissioner or agency orders the discontinuance of such existing land use. In the event any land use is so directed to be discontinued, adequate compensation therefor shall be paid by the state of New York either by agreement with the real property owner, or in accordance with condemnation proceedings thereon. The following land uses shall be allowed or prohibited within the exterior boundaries of designated river areas depending on the classification of such areas:

a. In wild river areas, no new structures or improvements, no development of any kind and no access by motor vehicles shall be permitted other than forest management pursuant to forest management standards duly promulgated by regulations.

b. In scenic river areas, the continuation of present agricultural practices, the propagation of crops, forest management pursuant to forest management standards duly promulgated by regulations, limited dispersed or cluster residential developments and stream improvement structures for fishery management purposes shall be permitted. There shall be no mining, excavation, or construction of roads, except private roads necessary for residential, agricultural or forest management pur-

poses, and with the further exception that public access through new road construction may be allowed, provided that there is no other such access within two land miles in either direction.

c. In recreational river areas, the lands may be developed for the full range of agricultural uses, forest management pursuant to forest management standards duly promulgated by regulations, stream improvement structures for fishery management purposes, and may include small communities as well as dispersed or cluster residential developments and public recreational areas. In addition, these river areas may be readily accessible by roads or railroads on one or both banks of the river, and may also have several bridge crossing and numerous river access points.

Added L.1973, c. 400, § 39; amended L.1973, c. 348, § 9; L.1973, c. 401, § 4; L.1975, c. 613, §§ 4, 5.

1975 Amendment. Subd. 1. L.1975, c. 613, § 4, eff. Sept. 1, 1975, substituted "title" for "part" and provided that in connection with the administration, the commissioner or the agency may provide for the preparation and implementation of management plans for individual river areas or significant portions thereof.

Subd. 2. L.1975, c. 613, § 5, eff. Sept. 1, 1975, inserted in introductory paragraph "or improvement" following "other structure" and the clause "except as expressly authorized in paragraphs b and c of this subdivision" in first sentence; inserted in par. a following "shall be permitted" the phrase "other than forest management pursuant to forest management standards duly promulgated by regulations"; in par. b, substituted "the propagation of crops, forest management pursuant to forest management standards duly promulgated by regulations, limited dispersed or cluster residential developments and stream improvement structures for fishery management purposes" for "selective timber harvesting, and the propagation of crops" and deleted "existing" preceding "private roads"; and in par. c, deleted "and selective timber harvesting" preceding "uses" and inserted "forest management pursuant to forest management standards duly promulgated by regulations, stream improvement structures for fishery management purposes" following "uses,".

1973 Amendments. Subd. 1. L. 1973, c. 401, § 4, eff. June 5, 1973, substituted "15-2711 of this chapter" for "four hundred twenty-nine-p of this part."

Subd. 3, 4. L.1973, c. 348, § 9, eff. Aug. 1, 1973, repealed subds. 3 and 4 which covered, respectively, the interim project review powers of the Adirondack park agency as they applied to private lands within river areas in the Adirondack park and the powers, policy, and procedures to be followed by the Adirondack park agency in promulgating rules and regulations to carry out the Wild, Scenic and Recreational Rivers System program pending the adoption of the Adirondack park land use and development plan.

Derivation. Conservation Law of 1911, c. 647, § 429-o, added L.1972, c. 869, § 1; and repealed by L.1973, c. 400, § 92.

Effective Date. Section 94 of L. 1973, c. 400, provided that this section is effective June 5, 1973.

§ 15-2711. Establishing boundaries

The commissioner shall, within one year after a river has been included in the state wild, scenic and recreational rivers system, establish detailed boundaries of the river area associated with that river, except that in the case of river areas within the Adirondack park said boundaries shall be mutually agreed upon by the commissioner and the agency. Said boundaries shall not exceed a width of one-half mile from each bank thereof.

Added L.1973, c. 400, § 39.

Derivation. Conservation Law of 1911, c. 647, § 429-p, added L.1972, c. 869, § 1; and repealed by L.1973, c. 400, § 92.

Effective Date. Section 94 of L. 1973, c. 400, provided that this section is effective June 5, 1973.

§ 15-2713. Initial designations

The following rivers which are located within the boundaries of the Adirondack park, as now defined by law, are to be initially included in this system being classified by the above-stated criteria:

1. Wild rivers

a. Cedar river--Approximately seven miles from the southwest boundary of lot 82, township 17, Totten and Crossfield's Purchase to the Hamilton county line.

b. Cold river—Approximately fourteen miles from the Duck Hole to the confluence with the Raquette river and the entire three-mile length of Ouluska Pass brook.

c. Hudson river—Approximately ten and one-half miles from the confluence of the Cedar river to the confluence with Boreas river.

d. Indian river—Approximately thirteen miles from Brook Trout lake to the confluence with the south branch of the Moose river.

e. Opalescent river—Approximately eleven miles from Flowed Lands to the confluence with the Hudson river.

f. East branch of the Sacandaga river—Approximately eleven and one-half miles from Botheration pond to a point one-half mile above the confluence with Cook brook.

g. West branch of the Sacandaga river—Approximately seven miles from the confluence of the Piseco lake outlet to the confluence with Dugway creek.

h. West Canada creek—Approximately eight miles from Mud lake to the Old Mitchell dam site.

2. Scenic rivers

a. Ampersand brook—Approximately eight miles from Ampersand pond to the confluence with the Raquette river.

b. Ausable river—Approximately nine miles from Marcy swamp to St. Hubert's.

c. Boreas river—Approximately eleven and one-half miles from Cheney pond to the confluence with the Hudson river.

d. Bouquet river—Approximately six miles of the North Fork from the headwaters on Dial mountain to the bridge on route 73. Approximately five and one-half miles of the South Fork from the headwaters to the bridge on route 73.

e. Cedar river—Approximately five miles from the Hamilton County line to the confluence with the Hudson river.

f. Hudson river—Approximately nine miles from the hamlet of Newcomb to the confluence with the Cedar river and approximately four miles from the confluence with the Boreas river to a point one mile north of the hamlet of North river.

g. South branch of the Moose river—Approximately eighteen miles from the east boundary of the state land immediately west of Little Moose lake to the west boundary of state land near Rock Dam and approximately six and one-half miles from the east boundary of state land just north of Woodhull mountain downstream to the state land boundary near the confluence with the middle branch of the Moose river.

3. Recreational rivers

a. West branch of Ausable river—Approximately five miles from the state boundary along the River road east of Big Cherry Patch pond downstream to the state boundary immediately west of High Falls.

Added L.1973, c. 400, § 39; amended L.1975, c. 613, §§ 6-9.

1975 Amendment. Subd. 1, par. a. L.1975, c. 613, § 6, *eff. Sept. 1, 1975*, added par. a. *Former par. a* relettered b.

Subd. 1, pars. b to h. L.1975, c. 613, § 7, eff. Sept. 1, 1975, relettered former pars. a to g as b to h.

Subd. 2, par. e. L.1975, c. 613, § 8, eff. Sept. 1, 1975, substituted "five miles from the Hamilton County line" for "six miles from just north of the hamlet of Indian lake".

Subd. 2, par. g. L.1975, c. 613, § 8, eff. Sept. 1, 1975, inserted following "Approximately" the words "eighteen miles from the east boundary of the state land immediately west of Little Moose lake to the west boundary of state land near Rock Dam and approximately".

Subd. 3. L.1975, c. 613, § 9, eff. Sept. 1 1975, deleted par. a which included the South branch of the Moose river as a recreational river and relettered former par. b as a.

Derivation. Conservation Law of 1911, c. 647, § 429-q, added L.1972, c. 803, § 1; and repealed by L.1973, c. 400, § 92.

Effective Date. Section 94 of L. 1973, c. 400, provided that this section is effective June 5, 1973.

§ 15-2714. Additional designations

In addition to the rivers designated in section 15-2713 of this chapter, the following rivers are included in the system, being classified by the criteria stated in section 15-2707:

1. Wild rivers

a. Cedar river—Approximately seven and three-tenths miles from the outlet of Cedar lakes to a point where a road crosses the river approximately one and one-half miles upstream of Cedar river flow.

b. Kunjamuk river—Approximately eight miles from the outlet of South pond to a fish barrier dam near the southwest boundary of lot 9, township 31, Gorton Tract.

c. Main branch of the Oswegatchie river—Approximately eighteen and one-half miles from the Partlow Mill dam to the southernmost boundary between private and state land at Inlet.

d. Middle branch of the Oswegatchie river—Approximately fourteen and one-half miles from the north boundary of lot 27, Watson's East Triangle to a point one mile downstream of the confluence with Wolf creek.

e. Piseco outlet—Approximately four and one-fifth miles from a point one-half mile east of the route 10 bridge crossing to the confluence with the West Branch of the Sacandaga river.

f. West branch of the Sacandaga river—Approximately nine miles from the source near Silver lake mountain to the Silver lake wilderness boundary near route 30 and approximately two and seven-tenths miles from the confluence with Cow creek to the confluence with Piseco outlet.

g. South branch of West Canada creek—Approximately five and nine-tenths miles from the headwaters near T-Lake falls to a footbridge crossing located approximately one mile upstream of the Floe.

2. Scenic rivers.

a. Black river—Approximately seven and eight-tenths miles from the point where Farr road crosses the river to the point where the river intersects the Adirondack park boundary.

b. Bog river—Approximately seven and three-tenths miles from the dam below Hitchins pond to Big Tupper lake.

c. Blue Mountain stream—Approximately nine miles from the outlet of Clear pond to the confluence with Pleasant lake stream.

d. Carmens river—Approximately one and one-quarter miles from its headwaters falling under the access road at Cathedral Pines park (formerly Camp Wilderness), Suffolk county, southerly to the south boundary of Camp Sobaco (Girl Scout Camp).

e. Carmens river—Approximately two and one-half miles from Yaphank avenue, Suffolk county, southerly to the Concrete Wing dam in Southhaven park.

f. Carmens river—Approximately two and one-half miles from the south side of Sunrise highway, Suffolk county, southerly to the mouth of the river (a line between Long Point and Sandy Point) at its confluence with Great South Bay.

g. Cedar river—Approximately ten miles from a point where a road crosses the river one and one-half miles upstream of Cedar river flow to a point where a southerly extension of the northeast state land boundary of lot 96, township 33, Totten and Crossfield's Purchase, would intersect the river.

h. Deer river—Approximately six and two-tenths miles from the outlet of Deer river flow to a point where the river intersects the Adirondack park boundary.

i. East Canada creek—Approximately twenty and nine-tenths miles from Powley Place to a point at which the creek intersects the Adirondack park boundary near Sprite creek at the southwest corner of lot 45, town of Oppenheim, Lott and Low's Patent.

j. Middle branch of the Grasse river—Approximately fourteen and one-half miles from the confluence of Blue Mountain stream and Pleasant lake stream to the confluence of the South Branch of the Grasse river.

k. North branch of the Grasse river—Approximately twenty-five and four-tenths miles from the outlet of Church pond to a point where the North Branch intersects the Adirondack park boundary.

l. South Branch of the Grasse river—Approximately thirty-five and two-tenths miles from the outlet of Center pond to the confluence with the outlet of Allen pond, and approximately three and seven-tenths miles from the most southerly point where the South Branch of the Grasse river intersects the Adirondack park boundary, north to the confluence with the Middle Branch of the Grasse river.

m. Independence river—Approximately twenty-six miles from the outlet of Little Independence pond to the point where the Sperryville bridge crosses the river.

n. Jordan river—Approximately eighteen miles from the outlet of Marsh pond to Carry Falls reservoir.

o. Kunjamuk river—Approximately ten and four-tenths miles from a fish barrier dam near the southwest boundary of lot 9, township 31, Gorton Tract, to the confluence with the Sacandaga river.

p. Long Pond outlet—Approximately sixteen miles from the outlet of Long pond to the confluence with the West Branch of the St. Regis river.

q. Marion river—Approximately five miles from the outlet of Utowana lake to Raquette lake.

r. Main branch of the Moose river—Approximately fifteen and four-fifths miles from the confluence of the South and Middle Branches of the Moose river to a point where the Main Branch intersects the Adirondack park boundary.

s. South branch of the Moose river—Approximately fourteen and two-fifths miles from the west boundary of state land near Rock dam to the east boundary of state land north of Woodhull mountain.

t. Middle branch of the Oswegatchie river—Approximately nine miles from the outlet of Walker lake to the north boundary of lot 27, Watson's East Triangle and approximately fourteen and two-fifths miles from a point one mile downstream of the confluence with Wolf Creek to a point where the Middle Branch intersects the Adirondack park boundary at the southeast boundary of lot 993, township of Diana, Macomb's Purchase, great tract 4.

u. West branch of the Oswegatchie river—Approximately seven miles from the outlet of Buck pond to a point approximately one mile upstream of Round pond at the point where a foot and snowmobile bridge crosses the West Branch.

v. Otter brook—Approximately ten miles from the outlet of Lost pond to the confluence with the South Branch of the Moose river.

w. Raquette river—Approximately twenty miles from the outlet of Long lake to the confluence with a small stream from the northeast,

located approximately one mile downstream from Troubley Landing, and approximately thirteen and eight-tenths miles from the confluence with Dead creek to a point where the river intersects the north boundary of lot 1, township 5, Tannery Lot near Carry Falls reservoir.

x. Red river—Approximately nine and seven-tenths miles from the headwaters of the river to the confluence with the South Branch of the Moose river.

y. Rock river—Approximately six and nine-tenths miles from the O'Neil flow road crossing to the confluence with the Cedar river.

z. Round lake outlet—Approximately two and seven-tenths miles from the outlet of Round lake to the confluence with the Bog river.

aa. East branch of the St. Regis river—Approximately fourteen and one-half miles from a point where route 30 crosses the East Branch near Meacham lake, to a point one-half mile upstream from Everton falls.

bb. Main branch of the St. Regis river—Approximately fifteen and five-tenths miles from a point where a private road to Bay pond crosses the Main Branch in lot 16, township 17, Macomb's Purchase, great tract 1, to the confluence with Balsam brook.

cc. West branch of the St. Regis river—Approximately thirty-five miles from the outlet of Little Fish pond to a point one-half mile downstream from the confluence with Fenner Meadow brook.

dd. West Canada creek—Approximately seventeen miles from a point where the creek intersects the state land boundary approximately two miles upstream of the Old Mitchell Dam site, to the route 8 bridge crossing near Nobleboro.

ee. West Stony creek—Approximately seven and seven-tenths miles from the Tannery road crossing to the confluence with Hatch brook.

3. Recreational rivers

a. East branch of the Ausable river—Approximately twenty-eight and three-tenths miles from St. Huberts to the confluence with the West Branch.

b. Main branch of the Ausable river—Approximately twenty-two miles from the confluence of the East and West Branches of the Ausable river to Lake Champlain.

c. West branch of the Ausable river—Approximately twenty-nine and one-half miles from the headwaters of the West Branch near Heart lake to the confluence with the East Branch.

d. Black river—Approximately six and three-fifths miles from the outlet of North lake to a point where Farr road crosses the river.

e. Bouquet river—Approximately forty-seven and seven-tenths miles from the confluence with the North Fork of the Bouquet river to Lake Champlain.

f. Carmens river—Approximately two miles southerly from the southern boundary of Camp Sobaco, Suffolk county, to Yaphank avenue. However, the rules and regulations applicable to recreational rivers as set forth in title twenty-seven of this law shall not apply to any lands or structures included in the proposed Yaphank historic district. This exclusion shall take effect only upon the creation of said Yaphank historic district.

g. Carmens river—Approximately one mile southerly from the Concrete Wing dam in Southaven park, Suffolk county, to Sunrise highway.

h. Cedar river—Approximately eleven miles from a point at which a southerly extension of the northeast state land boundary parallel to the southwest boundary of lot 96, township 33, Totten and Crossfield's Purchase would intersect the river to the southwest boundary of lot 82, township 17, Totten and Crossfield's Purchase.

i. Connetquot river—Approximately five miles from the main line of the Long Island railroad, Suffolk county, south to the Sunrise highway.

j. South branch of the Grasse river—Approximately five and one-fifth miles from the confluence with the outlet of Allen pond to the most southerly point where the South Branch intersects the Adirondack park boundary.

k. Hudson river—Approximately twelve and seven-tenths miles from the confluence with the Opalescent river to a point where route 28N crosses the Hudson river at Newcomb and approximately forty-five and nine-tenths miles from a point one mile north of North river to the confluence with the Sacandaga river.

l. Independence river—Approximately one-half mile from a point where the Sperryville bridge crosses the river to a point where the river intersects the Adirondack park boundary.

m. Indian river—Approximately eight and three-tenths miles from the outlet of Indian lake to the confluence with the Hudson river.

n. Main branch of the Oswegatchie river—Approximately two and three-tenths miles from the southernmost boundary between private and state land at Inlet to Wanakena.

o. West branch of the Oswegatchie river—Approximately six and one-tenth miles from a point approximately one mile upstream of Round pond at the point where a foot and snowmobile bridge crosses the West Branch to a point where the river intersects the Adirondack park boundary.

p. Raquette river—Approximately twenty-two miles from the outlet of Raquette lake to the outlet of Long lake and approximately seventeen miles from the confluence of the Raquette river and a small stream from the northeast, at a point approximately one mile downstream from Trombley landing to the confluence with Dead creek.

q. Rock river—Approximately one and one-fifth miles from the outlet of lake Durant to the O'Neil flow road crossing.

r. East branch of the St. Regis river—Approximately six and one-tenth miles from a point one-half mile upstream of Everton falls to the confluence with the Main Branch of the St. Regis river.

s. Main branch of the St. Regis river—Approximately seven miles from the St. Regis Church to a point where a private road to Bay pond crosses the Main Branch in lot 16, township 17, Macomb's Purchase, great tract 1, and approximately eighteen miles from the confluence with Balsam brook to a point at which the river intersects the Adirondack park boundary.

t. West branch of the St. Regis river—Approximately five and one-half miles from a point one-half mile downstream of the confluence with Fenner Meadow brook to a point where the West Branch intersects the Adirondack park boundary.

u. East branch of the Sacandaga river—Approximately fourteen miles from a point approximately one-half mile above Cook brook to the confluence with the Main Branch of the Sacandaga river.

v. Main branch of the Sacandaga river—Approximately thirty-one miles from the outlet of Lake Pleasant to the inlet of Great Sacandaga lake.

w. West branch of the Sacandaga river—Approximately ten and three-fifths miles from the Silver lake wilderness boundary near the most upstream route 10 bridge crossing to the confluence with Cow creek and approximately seven and two-tenths miles from the confluence of Dugway creek to the confluence with the Main Branch of the Sacandaga river.

x. Salmon river—Approximately twelve and three-tenths miles from the outlet of Elbow ponds to the point where the river intersects the Adirondack park boundary.

y. Main branch of the Saranac river—Approximately sixty and two-fifths miles from the outlet of Upper Saranac lake to the point where the river intersects the Adirondack park boundary.

z. Schroon river—Approximately sixty-six and seven-tenths miles from the outlet of the former Dead Water pond to the confluence with the Hudson river.

aa. West Canada creek—Approximately eleven miles from the route 8 bridge crossing near Noblehoro to the Harvey road bridge crossing.

bb. South branch of West Canada creek—Approximately nine and seven-tenths miles from the footbridge crossing one mile upstream of The Floe to the confluence with the Main Branch of West Canada creek.

cc. West Stony creek—Approximately six miles from the Persch road crossing to the Tannery road crossing and approximately two and seven-tenths miles from the confluence with Hatch brook to the confluence with the Main Branch of the Sacandaga river.

Added L.1973, c. 519, § 1; amended L.1974, c. 815, § 1; L.1975, c. 613, § 10.

1975 Amendment. Subd. 1. L.1975, c. 613, § 10, eff. Sept. 1, 1975, added pars. a to g.

Subd. 2. L.1975, c. 613, § 10, eff. Sept. 1, 1975, added pars. a to c, relettered former pars. a to c as d to f, and added pars. g to cc.

Subd. 3. L.1975, c. 613, § 10, eff. Sept. 1, 1975, added pars. a to c, relettered former pars. b and c as f and g, added par. h, relettered former par. a as i, and added pars. j to cc.

1974 Amendment. L.1974, c. 815, § 1, eff. on 30th day after June 7, 1974, added pars. a, b, and c under Scenic rivers, and pars. b and c under Recreational rivers.

Effective Date. Section 3 of L. 1973, c. 519, provided that this section is effective on the 30th day after June 5, 1973.

§ 15-2715. Designation of additions to the system

1. The commissioner or agency shall study and from time to time submit to the governor and to the legislature proposals for the addition to the state wild, scenic and recreational rivers system of river areas which, in their judgment, fall within one or more of the descriptive classes set out in this title. Each proposal shall specify the class or classes of the proposed addition and shall be accompanied by a detailed report on the factors which, in the judgment of the commissioner or agency, make the area a worthy addition to the system. The report shall show the area included within the proposal; the characteristics which make the area a worthy addition to the system; the current status of land ownership and use in the area; the anticipated acquisitions of land and scenic or other easements in the area; the potential uses of the land and water; and the cost of acquisitions of land and scenic or other easements and improvements proposed. The commissioner or agency shall send the report to the legislative authority of each county, town, and municipal corporation, any part of which is within the area, and to the commissioner of transportation, commissioner of agriculture and markets, commissioner of health, and commissioner of commerce. Thereafter, each proposal shall be submitted to the governor and the legislature for adoption or modification. This section is not intended to preclude or discourage studies and proposals by other agencies or by citizen groups working independently or with the commissioner or the agency, provided that such studies and proposals shall be conducted and made in accordance with the criteria and procedures set forth in this subdivision and shall be submitted to the agency or the commissioner as appropriate for comment prior to submission of any proposal to the governor or the legislature. The commissioner and the agency shall provide technical assistance to and cooperate with any such agencies and citizen groups.

2. Not later than three years after the effective date upon which each of the following rivers shall have been designated for study by inclusion in this subdivision, the agency, after consultation and co-

operation with the commissioner with respect to rivers within the Adirondack park, or the commissioner with respect to rivers elsewhere, is hereby directed to consider and make proposals to the legislature for the addition of each such river to the state wild, scenic and recreational rivers system:

a. The Batten Kill river from the Vermont state line to the dam at Greenwich.

b. The Delaware river from Port Jervis to the junction of the East and West Branches of the Delaware river, and the East Branch of the Delaware river upstream to the Downsville dam, and the West Branch of the Delaware river upstream to the Cannonsville dam.

c. The Genesee river from the Pennsylvania state line to Letchworth State Park.

d. The Susquehanna river from Otsego lake to Bainbridge at the Route 206 crossing.

e. Carmens river—Approximately ten miles from its headwaters at Camp Wilderness Access road, Suffolk county, to its confluence with Great South bay.

f. Connetquot river—Approximately one and one-half miles from its headwaters north of Veterans' Memorial highway, Suffolk county, south to the main line of the Long Island railroad. Approximately four miles from the Sunrise highway, Suffolk county, south to its confluence with great South bay.

g. Bouquet river—Approximately twenty-four miles of the North Branch from Trout pond to the confluence with the Main Branch.

h. The Branch—Approximately sixteen miles from Elk lake to the confluence with the Schroon river.

i. East Stony creek—Approximately eighteen miles from Harrisburg lake to Great Sacandaga lake.

j. Grasse river—Approximately twenty-five miles of the Main Branch from the confluence with the South Branch to the village of Canton.

k. Moose River—Approximately nineteen miles of the North Branch from Big Moose lake to the confluence with the Middle Branch and approximately thirteen and one-half miles of the Middle Branch from the confluence with the North Branch to the confluence with the South Branch.

l. Osgood river—Approximately fourteen miles from Jones pond to Meacham lake.

m. Oswegatchie river—Approximately eleven miles of the Main Branch from the Cranberry lake outlet to River road.

n. Pleasant Lake stream—Approximately seven miles from Pleasant lake to the confluence with the Middle Branch of the Grasse river.

o. Saranac river—Approximately seventeen miles of the North Branch from Mud pond to the confluence with the Main Branch.

Added L.1973, c. 400, § 39; amended L.1973, c. 401, § 5; L.1973, c. 519, § 2; L.1975, c. 613, §§ 11, 12.

1975 Amendment. Subd. 1, L.1975, c. 613, § 11, eff. Sept. 1, 1975, substituted in first sentence "title" for "part" and added provisions requiring the studies and proposals to be conducted and made in accordance with the criteria and procedures set forth in this subd. and to be submitted to the agency or the commissioner as appropriate for comment prior to submission of any proposal to the governor or the legislature and requiring the commissioner and the agency to provide technical assistance to and cooperate with any of the agencies and citizen groups.

Subd. 2, opening par, L.1975, c. 613, § 12, eff. Sept. 1, 1975, added initial text "Not later than three years after the effective date upon which each of the following rivers shall have been designated for study by inclusion in this subdivision" and deleted "within three years of the effective date of this act" and "of the following rivers" following "legislature" and "river systems".

Subd. 2, pars. a to z, L.1975, c. 613, § 12, eff. Sept. 1, 1975 relettered as par. a former par. b Batten Kill river description and deleted former par. a Ausable river description; re-

lettered as par. b former par. i Delaware river description and former par. b as par. a; relettered as par. c former par. k Genesee river description and deleted former par. c Big brook description; relettered as par. d former par. dd Susquehanna river description and deleted former par. d Black river description; relettered as par. e former par. ff Carmens river description and deleted former par. e Hog river description; relettered as par. f former par. gg Connetquot river description and incorporated former par. f Bouquet river designation in par. g; incorporated in par. g former par. f Bouquet river designation and deleted former par. g Cedar river description; added par. h The Branch description and deleted former par. h Deer river description; added par. i East Stony creek description and relettered former par. i Delaware river description as par. b; incorporated in par. j former par. l Grasse river designation and deleted former j East Canada creek description; incorporated in par. k former par. s Moose river designation and relettered former par. k Genesee river description as par. c; added par. l Osgood river description and incorporated former par. l Grasse river designation in par. j; incorporated in par. m former par. t Oswegatchie river designation and deleted former par. m Hudson river description; added par. n Pleasant Lake stream description and deleted former par. n Independence river description; incorporated in par. o former par. aa Saranac river designation and deleted former par. o Indian river description; deleted former pars. p to. r Jordan, Kunjamuk and Marion river descriptions; incorporated former par. s Moose river designation in par. k; incorporated former par. t Oswegatchie river designation in par. m; and deleted former pars. u to x Otter brook, Raquette river, Rock river, Sacandaga river, Saloon river, and St. Regis river descriptions.

Subd. 2, pars. aa to gg, L.1975, c. 613, § 12, eff. Sept. 1, 1975, incorporated former par. aa Saranac river designation in par. o, deleted former pars. bb and cc Schroon river and Stony creek descriptions, relettered former par. dd Susquehanna river description as par. d, deleted former par. ee West Canada creek description, and relettered former pars. ff and gg Carmens river and Connetquot river descriptions as pars. e and f.

1973 Amendments. Subd. 2, pars. a, t. L.1973, c. 401, § 5, eff. June 5, 1973, substituted "15-2713 of this chapter" for "429-q of this part" in par. a, and "to" for "of" preceding "Wanakena" in par. t.

Subd. 2, pars. ff and gg. L.1973, c. 519, § 2, eff. on the 30th day after June 5, 1973, added pars. ff and gg.

Derivation. Conservation Law of 1911, c. 647, § 429-r, added L.1972, c. 869, § 1; and repealed by L.1973, c. 400, § 92.

Effective Date. Section 94 of L. 1973, c. 400, provided that this section is effective June 5, 1973.

§ 15-2717. Cooperation with the federal government

Nothing in this title shall preclude a section of the state wild, scenic and recreational rivers system from becoming a part of the national wild and scenic rivers system.[1] The commissioner and the agency are directed to encourage and assist any federal studies for inclusion of New York State rivers in the national wild and scenic rivers system.

Added L.1973, c. 400, § 39; amended L.1973, c. 401, § 6.

[1] See 16 U.S.C.A. § 1271 et seq.

1973 Amendment. L.1973, c. 401, § 6, eff. June 5, 1973, substituted "this title" for "this part three-c."

Derivation. Conservation Law of 1911, c. 647, § 429-s, added L.1972, c. 869, § 1; and repealed by L.1973, c. 400, § 92.

Effective Date. Section 94 of L. 1973, c. 400, provided that this section is effective June 5, 1973.

§ 15-2719. Cooperation clause

The commissioner and agency shall cooperate with each other and coordinate their activities with respect to their respective jurisdictions over the designated rivers within the Adirondack park to ensure compliance for the general criteria and management objectives set forth in this part.[1]

Added L.1973, c. 400, § 39.

[1] So in original. Probably should read "title."

Derivation. Conservation Law of 1911, c. 647, § 429-t, added L.1972, c. 869, § 1; and repealed by L.1973, c. 400, § 92.

Effective Date. Section 94 of L. 1973, c. 400, provided that this section is effective June 5, 1973.

§ 15-2721. Conflict with other laws

Any section of the state wild, scenic and recreational rivers system that is or shall become a part of the Forest Preserve, the Adirondack or Catskill Parks or any other state park, wildlife refuge, or similar area shall be subject to the provisions of this title, and the laws and constitutional provisions under which the other areas may be administered, and in the case of conflict between the provisions of those laws and constitutional provisions and the provisions of this title, the more restrictive provisions shall apply.

Added L.1973, c. 400, § 39; amended L.1973, c. 401, § 7; L.1975, c. 613, § 13.

1975 Amendment. L.1975, c. 613, § 13, eff. Sept. 1, 1975, inserted reference to the Adirondack or Catskill Parks or other state park.

1973 Amendment. L.1973, c. 401, § 7, eff. June 5, 1973, substituted "title" for "part" in two places.

Derivation. Conservation Law of 1911, c. 647, § 429-n, added L.1972, c. 889, § 1; and repealed by L.1973, c. 400, § 92.

Effective Date. Section 94 of L. 1973, c. 400, provided that this section is effective June 5, 1973.

§ 15-2723. Penalties and enforcement

Any person who violates any provision of this title or any regulation or order issued pursuant to this act by the commissioner or the agency may be compelled to comply with or obey the same by injunction, mandamus or other appropriate remedy. In addition, any such person shall pay a civil penalty of not less than one hundred dollars or more than one thousand dollars for each day of such violation. The commissioner or the agency as the case may be, is authorized to commence a civil action to recover such civil penalties or other appropriate relief.

Added L.1973, c. 400, § 39; amended L.1973, c. 401, § 7; L.1975, c. 613, § 14.

1975 Amendment. L.1975, c. 613, § 14, eff. Sept. 1, 1975, authorized the commissioner or the agency to commence a civil action to recover civil penalties or other appropriate relief.

1973 Amendment. L.1973, c. 401, § 7, eff. June 5, 1973, substituted "title" for "part."

Derivation. Conservation Law of 1911, c. 647, § 429-v, added L.1972, c. 889, § 1; and repealed by L.1973, c. 400, § 92.

Effective Date. Section 94 of L. 1973, c. 400, provided that this section is effective June 5, 1973.

ARTICLE 17—WATER POLLUTION CONTROL

Title
6. State pollutant discharge elimination system [New].

TITLE 1—GENERAL PROVISIONS AND PUBLIC POLICY

§ 17-0105. Definitions applicable to portions of this article

When used in titles 1 to 11, inclusive, and title 19 of this article:

[See main volume for text of 1 to 12]

13. "State Pollutant Discharge Elimination System" or "SPDES" means the system established pursuant hereto for issuance of permits authorizing discharges to the waters of the state.

14. "National Pollutant Discharge Elimination System" or "NPDES" means the national system for the issuance of permits under the Federal Water Pollution Control Act.

15. "Effluent standard and/or limitation" means any restriction on quantities, quality, rates and concentrations of chemical, physical, biological, and other constituents of effluents which are discharged into or

APPENDIX NO. 2

Tennessee Scenic Rivers Act of 1968. 3A Tenn. Code Annotated, 1973 Replacement Part, §§11-1401 to 11-1417.

CHAPTER 14

SCENIC RIVERS

SECTION.		SECTION.	
11-1401.	Title.	11-1409.	Acquisition of land.
11-1402.	Definitions.	11-1410.	Power of eminent domain.
11-1403.	Classes of rivers includable in system.	11-1411.	Land uses permitted.
11-1404.	Rivers initially included in system.	11-1412.	Conflict with other laws.
11-1405.	Proposals for additions to system.	11-1413.	Cooperation of other state agencies with commissioner of conservation.
11-1406.	Administration of system — Criteria.	11-1414.	Cooperation with federal government.
11-1407.	Classification in higher status.	11-1415.	Assistance from other agencies.
11-1408.	Establishing boundaries of area.	11-1416.	Water pollution control.
		11-1417.	Violations—Penalty.

11-1401. Title.—This chapter shall be known by the title "The Tennessee Scenic Rivers Act of 1968." [Acts 1968 (Adj. S.), ch. 540, § 1.]

11-1402. Definitions.—Except as otherwise required by the context, the following terms when used in this chapter shall be construed respectively to mean:

(1) "River" means a flowing body of water or a section, portion or tributary thereof, including rivers, streams, creeks, branches, or small lakes.

(2) "Free flowing" means existing or flowing in natural condition without impoundment, diversion, straightening, rip-rapping, or other modification of the waterway. The existence, however, of low dams, diversion works, and other minor structures at the time any river is proposed for inclusion in the state scenic rivers system shall not automatically bar its consideration for such inclusion: provided, that this shall not be construed to authorize, intend, or encourage future construction of such structures within components of the state scenic rivers system.

(3) "Road" means highway, hard-surface road, improved and unimproved dirt road. The existence, however, of unimproved roads at the time any river is proposed for inclusion in the state scenic rivers system shall not automatically bar its consideration for such inclusion: provided, that this shall not be construed to authorize, intend, or encourage future construction of such roads where this would be contrary to the provisions of this chapter.

(4) "Scenic easement" means a perpetual right in land of less than fee simple which (i) obligates the grantor and his heirs and assigns to certain restrictions constituted to maintain and enhance the scenic qualities of those lands bordering the river; (ii) is restricted to the area defined in the easement deed; (iii) grants no right of physical access to the public; (iv) and grants a privilege to the commissioner, his servants and agents only, to go upon the land for the purpose of compliance inspection.

(5) "Public use easement" means a perpetual right in land of less than fee simple which (i) obligates the grantor and his heirs and assigns to certain restrictions constituted to maintain and enhance the scenic qualities of those lands bordering the river; (ii) is restricted to the area defined in the easement deed; (iii) and grants a right of public use but prohibits camping.

(6) "Public access area" means an area adjoining the river acquired by the state in fee simple. [Acts 1968 (Adj. S.), ch. 540, § 3; 1972 (Adj. S.), ch. 686, § 1.]

Section to Section Reference. This section is referred to in §§ 11-1405, 11-1409.

11-1403. Classes of rivers includable in system.—The following types of rivers are eligible for inclusion in the state scenic rivers system in which they will be administered in general accord with the criteria hereinafter set forth:

Classes of Scenic River Areas

Class I Natural river areas
Class II Pastoral river areas
Class III Partially developed river areas

Class I Natural River Areas

Those free-flowing rivers or sections of rivers with shorelines and scenic vistas unchanged, or essentially unchanged, by man, with no extensive paralleling roads closer than one (1) mile (except in river gorges where there must be no extensive paralleling roads within the gorge or within one quarter (¼) mile back from the gorge rim), and with only a limited number of crossing roads or spur roads existing at the time of designation as a state scenic river. Additional access would be limited to trails. Waters would be kept unpolluted. Lands adjacent to these rivers that are not already in state or other public ownership should be protected by acquisition of fee title or by conservation easements to the full extent necessary to preserve a true natural environment. These river areas should be managed in accordance with the concepts embodied in the national Wilderness Act (78 Stat. 890; 16 U. S. C. ch. 23), and would represent samples of natural America saved unspoiled for this and future generations to enjoy as precious pieces of our natural heritage.

Class II Pastoral River Areas

Those free-flowing rivers or sections of rivers the lands adjacent to which are partially or predominantly used for agriculture and other dispersed human activities which do not substantially interfere with public use and enjoyment of the rivers and their shores. Waters would be kept unpolluted. Lands adjacent to any such river would remain primarily in the type of use existing at the time of designation as a state scenic river or else be allowed to revert to natural conditions. Scenic

values should be preserved by acquisition of conservation easements, zoning and similar means, and by acquisition of fee title of areas set aside for access, camping and recreation. Acquisition of fee title of other areas would not be precluded, particularly where the cost of alternative methods of land use control is comparable to the cost of acquiring the fee with lease-back or other similar arrangements.

Class III Partially Developed River Areas

Those rivers or sections of rivers in areas affected by the works of man, but which still possess actual or potential scenic values. Included would be rivers with some housing or other building developments near their shorelines, rivers with parallel roads or railroads, rivers with some impoundments, and rivers polluted, for example, by strip-mine run-off. These rivers would be managed to prevent further loss of scenic values, to improve the scenic aspects of their surroundings, and to restore the quality of their waters. A polluted river section in an otherwise natural area could be improved to the point where it would be upgraded to class I. Lands adjacent to any such river and the use thereof, should be subject to public control by zoning, tax incentives, acquisition of easements or fee title and other means sufficient to realize the purposes for which such river is designated a state scenic river. [Acts 1968 (Adj. S.), ch. 540, § 4.]

Compiler's Note. The national Wilderness Act may be found in F. C. A. tit. 16, §§ 1131-1136.

11-1404. Rivers initially included in system.—The rivers or segments of rivers to be initially included in this system, being classified by the above stated criteria, are as follows:

Class I Natural River Areas

Blackburn Fork—That segment of the stream from the county road at Cummings Mill downstream one and one-half (1½) miles.

Conasauga River—The entire segment of the river in Polk County, Tennessee, upstream from the Highway 411 Bridge.

Roaring River—That segment from State Route 136 downstream two (2) miles.

Spring Creek—That segment from Waterloo Mill downstream to the Overton-Jackson County line.

Hatchie River as a swamp river.

Class II Pastoral River Areas

Blackburn Fork—That segment downstream from a point one and one-half (1½) miles downstream from the county road at Cummings Mill to its confluence with Roaring River.

Buffalo River—The entire river, except that portion which lies within Wayne, Perry, Humphreys and Lewis Counties.

Collins River—That segment from its normal flow source at the Big Spring, two (2) miles north of Beersheba Springs, to its confluence with Great Falls Lake.

Harpeth River—The entire river except that segment lying North of Highway 100 and South of Interstate 40 in Davidson County; and except those segments located in Cheatham, Dickson and Williamson Counties.

Roaring River—That segment downstream from a point two (2) miles downstream from State Route 136, to its confluence with the future Cordell Hull Lake.

Spring Creek—That segment between State Highway 136 and Waterloo Mill, and that segment downstream from the Overton-Jackson County line to its confluence with Roaring River.

Class III Developed River Areas

French Broad River—That segment from the North Carolina State line to its confluence with Douglas Lake.

Harpeth River—Only that segment of the Harpeth River lying North of Highway 100 and South of Interstate 40; it being the specific intent to exclude all segments of the Harpeth River lying in or flowing through Cheatham, Dickson and Williamson Counties.

Tuckahoe Creek

Hiwassee River—That portion from the Highway 411 bridge to the North Carolina line. [Acts 1968 (Adj. S.), ch. 540, § 5; 1969, ch. 31, § 1; 1969, ch. 110, § 1; 1970 (Adj. S.), ch. 437, § 2; 1972 (Adj. S.), ch. 536, §§ 1, 2.]

Section to Section Reference. This section is referred to in § 11-1413.

11-1405. Proposals for additions to system.—The commissioner of conservation shall study and from time to time submit to the governor and to the general assembly proposals for the addition to the state scenic rivers system of rivers and sections of rivers which, in his judgment, fall within one or more of the categories set out in § 11-1402. Each proposal shall specify the category of the proposed addition and shall be accompanied by a detailed report on the factors which, in the judgment of the commissioner, make the area a worthy addition to the system. The intention of this requirement is to ensure that such studies will be made; it is not intended to preclude or discourage studies and proposals by other agencies or by citizen groups working independently or with the conservation department. [Acts 1968 (Adj. S.), ch. 540, § 6.]

11-1406. Administration of system—Criteria.—The scenic river system shall be administered by the department of conservation in cooperation with the game and fish commission and according to the policies and criteria set forth in this chapter. The commissioner of the department of conservation is authorized to make and enforce such regulations

as are necessary to carry out the provisions of this chapter as they relate to the scenic values of river areas. In such administration primary emphasis shall be given to protecting esthetic, scenic, historic, archeologic, and scientific features of the area; no buildings for accommodation, administration, or similar purposes shall be constructed, within a scenic river area, within view of the river or its banks, nor shall any automobile parking lots, campgrounds, or similar facilities be located in areas not adequately screened from the river. When publicizing the state's scenic rivers system, the commissioner shall not publicize, and shall omit from any publicity, any class II or class III river any part of which flows through a county with a population in excess of 400,000 persons according to the United States census of 1970 or any subsequent census.

Management plans for protection may differ in intensity within a given class of rivers or within a given river area, based on special attributes of the different localities, but should adhere to the following criteria as closely as possible:

(1) Class I scenic river areas should be managed in a manner which (i) would best maintain and enhance those conditions which are attributed to a wilderness type area, and those criteria embodied in § 11-1403, (ii) would allow camping and river access only at designated public access areas acquired in fee, and (iii) would allow for public use only within prescribed public use easements or public access areas.

(2) Class II scenic river areas should be managed in a manner which would best maintain and enhance the scenic values of the river and the adjacent lands while at the same time preserving the right of riparian landowners to use the river for customary agricultural and other rural purposes.

(3) Class III scenic river areas should be managed in a manner which would best maintain and enhance the scenic values of the river while at the same time preserving the right of riparian landowners to use the river for customary agricultural, residential, recreational, commercial, and industrial purposes. [Acts 1968 (Adj. S.), ch. 540, § 7; 1972 (Adj. S.), ch. 686, § 2.]

11-1407. Classification in higher status.—Whenever in the judgment of the commissioner of conservation a scenic river area previously administered as class II or class III has been sufficiently restored and enhanced in its natural scenic and recreational qualities, the commissioner of the department of conservation may recommend to the general assembly that such an area be classified to a higher status (class II raised to class I, or class III raised to class II or class I) and thereafter administered accordingly. No scenic river area shall be managed in a manner that would (i) result in the area falling into a lower class, or (ii) be detrimental to the highest water quality classification standards determined by federal and/or state agencies. [Acts 1968 (Adj. S.), ch. 540, § 8; 1972 (Adj. S.), ch. 686, § 3.]

11-1408. Establishing boundaries of area.—The commissioner of conservation shall, within two (2) years after a river or segment of river has been made part of the state scenic rivers system, determine generally the boundaries of the scenic river area associated with that river or river segment. Establishment of these boundaries shall be determined by the river classification as follows:

(1) For a class-I river (the gorge and swamp rivers), the boundary shall be established in such a way that it includes at least the entire scenic vista from the river and its banks. In the case of gorge rivers the boundaries shall be at least six hundred (600) feet but not more than three thousand (3,000) feet from the center of the river on each side. In the case of swamp rivers the boundaries shall be at least two hundred (200) feet but not more than one thousand (1,000) feet from the center of the river on each side.

(2) For class-II or class-III rivers area, the boundary shall include the vista from the river and shall be at least fifty (50) feet but not more than four hundred and fifty (450) feet from the usual banks of the river on each side. [Acts 1968 (Adj. S.), ch. 540, § 9; 1970 (Adj. S.), ch. 437, § 1.]

11-1409. Acquisition of land.—Within the exterior boundaries of a scenic river area, as established under § 11-1408, the commissioner of the department of conservation may acquire on behalf of the state of Tennessee lands in fee title, or an interest in land in the form of easements as defined in § 11-1402. Acquisition of land or of interest therein may be by donation, purchase with donated or appropriated funds, exchange, or otherwise. [Acts 1968 (Adj. S.), ch. 540, § 10; 1972 (Adj. S.), ch. 686, § 4.]

11-1410. Power of eminent domain.—In acquiring real property or the property interests therein as heretofore defined in § 11-1409 the commissioner of the department of conservation shall have and may exercise the power of eminent domain in accordance with the provisions of § 11-105 or under any other applicable statutory provisions, now in force or hereafter enacted for the exercise of the power of eminent domain. With regard to class II and class III scenic river areas, no public use easement or public access area may be acquired by eminent domain which is less than seven (7) river miles in either direction from another public use easement or public access area so acquired. Public access areas acquired through eminent domain may not exceed ten (10) acres in size. With regard to class II and class III scenic river areas, no interest in land acquired pursuant to this chapter, except public use easement or public access areas, shall grant or include a right or privilege to any person other than the commissioner, his servants and agents, to go upon land without the consent of the owner of the fee. [Acts 1968 (Adj. S.), ch. 540, § 11; 1972 (Adj. S.), ch. 686, § 5.]

11-1411. Land uses permitted.—Land uses to be allowed within the exterior boundaries of a scenic river area shall depend upon the classification of such an area, as follows:

(1) In class I scenic river areas, no new roads or buildings shall be constructed, and there shall be no mining. The cutting of timber shall be allowed pursuant to reasonable regulations issued by the commissioner of conservation, which regulations shall be consistent with commonly accepted tree farming practices.

(2) In class II and class III scenic river areas, the continuation of present agricultural practices, such as grazing and the propagation of crops, shall be permitted. The construction of farm-use buildings shall be permitted, provided that it is found to be compatible with the maintenance of scenic vistas from the stream and its banks. There shall be no mining, commercial timber harvest, or construction of roads paralleling the river within the limits of any scenic easement, public use easement or public access area. Public access through new road construction, as well as landings and other structures related to recreational use of these scenic river areas shall be allowed, provided there is no other such access within seven (7) river miles in either direction. [Acts 1968 (Adj. S.), ch. 540, § 12; 1972 (Adj. S.), ch. 686, § 6.]

11-1412. Conflict with other laws.—Any component of the state scenic river system that is or shall become a part of any state park, wildlife refuge, or similar area shall be subject to the provisions of this chapter and the laws under which the other areas may be administered, and in the case of conflict between the provisions of these laws the more restrictive provisions shall apply. [Acts 1968 (Adj. S.), ch. 540, § 13.]

11-1413. Cooperation of other state agencies with commissioner of conservation.—All state agencies shall, promptly upon enactment of this chapter, inform the commissioner of conservation of any proceedings, studies, or other activities within their jurisdiction, and regardless of by whom requested, which are now in progress and which affect or may affect any of the rivers specified in § 11-1404. They shall likewise inform him of any such proceedings, studies, or other activities which are hereafter commenced or resumed before they are commenced or resumed. Nothing in this chapter shall affect the jurisdiction or responsibilities of other state agencies under other provisions of law with respect to fish and wildlife. [Acts 1968 (Adj. S.), ch. 540, § 14.]

11-1414. Cooperation with federal government.—Nothing in this chapter shall preclude a component of the state scenic rivers system from becoming a part of any national scenic rivers system. The commissioner of conservation is directed to encourage and assist any federal studies for inclusion of Tennessee rivers in a national scenic rivers system. The commissioner of conservation may enter into written cooperative agreements for joint federal-state administration of a Tennessee component of any national scenic rivers system, provided such agree-

ments for the administration of water and land uses are not less restrictive than those set forth in this chapter. [Acts 1968 (Adj. S.), ch. 540, § 15.]

11-1415. Assistance from other agencies.—The commissioner of conservation may seek financial assistance for the state scenic rivers system from the land and water conservation fund and other federal and local government sources. In the administration and study of the system and in studies of potential additions to the system he may seek technical assistance from the bureau of outdoor recreation and other federal and local government agencies. [Acts 1968 (Adj. S.), ch. 540, § 16.]

11-1416. Water pollution control.—The commissioner of conservation shall cooperate with the appropriate federal and state water pollution control agencies and environmental management agencies, including forestry, for the purpose of eliminating or diminishing the pollution of waters within scenic river areas, providing such cooperation furthers the objectives of preserving natural stream flow and natural ecological conditions. [Acts 1968 (Adj. S.), ch. 540, § 17.]

11-1417. Violations—Penalty.—Whoever violates, fails, neglects or refuses to obey any provision of this chapter or regulation or order of the commissioner of the department of conservation may be compelled to comply with or obey the same by injunction, mandamus or other appropriate remedy; and provided further that whoever violates, fails, neglects or refuses to obey any provision of this chapter or regulation or order of the commissioner of the department of conservation may be punished by a fine of not more than fifty dollars ($50.00) for each day of such violation. [Acts 1968 (Adj. S.), ch. 540, § 18.]

CHAPTER 15

ARCHAEOLOGY

SECTION.
11-1501. Division established — Purposes.
11-1502. Definitions.
11-1503. Advisory council — Duties — Reports.
11-1504. Excavated artifacts — Property of state.
11-1505. Excavation of state lands — Permits — Unauthorized excavation — Misdemeanor.
11-1506. Defacement of sites or artifacts—Misdemeanor.
11-1507. Discovery of sites or artifacts —Notice to division.
11-1508. State lands — Reserved from sale—Procedure.
11-1509. Private land — Unauthorized excavation—Misdemeanor.
11-1510. Designation as an historic site —Procedure.
11-1511. Threatened site—Contract with corporations or organizations.
11-1512. Violations—Penalties.
11-1513. Contracts and cooperative agreements—Authorization.
11-1514. Acceptance of grants—Title to land.
11-1515. Tennessee Archaeological Society—Support of programs.
11-1516. Authorization to excavate — Moving artifacts from state —Limitation.
11-1517. Counties excepted.

APPENDIX NO. 3

Wisconsin Navigable Waters Protection Law, Wisc. Statutes Annotated §144.26 and §59.971.

3

144.26 Navigable waters protection law

(1) To aid in the fulfillment of the state's role as trustee of its navigable waters and to promote public health, safety, convenience and general welfare, it is declared to be in the public interest to make studies, establish policies, make plans and authorize municipal shoreland zoning regulations for the efficient use, conservation, develop-

ment and protection of this state's water resources. The regulations shall relate to lands under, abutting or lying close to navigable waters. The purposes of the regulations shall be to further the maintenance of safe and healthful conditions; prevent and control water pollution; protect spawning grounds, fish and aquatic life; control building sites, placement of structure and land uses and reserve shore cover and natural beauty.

(2) In this section, unless the context clearly requires otherwise:

(a) "Subcommittee" means the water subcommittee of the natural resources council of state agencies.

(c) "Municipality" or "municipal" means a county, village or city.

(d) "Navigable water" or "navigable waters" means Lake Superior, Lake Michigan, all natural inland lakes within Wisconsin and all streams, ponds, sloughs, flowages and other waters within the territorial limits of this state, including the Wisconsin portion of boundary waters, which are navigable under the laws of this state.

(e) "Regulation" refers to ordinances enacted under ss. 59.971 and 62.23(7) and means shoreland subdivision and zoning regulations which include control of uses of lands under, abutting or lying close to navigable waters for the purposes specified in sub. (1), pursuant to any of the zoning and subdivision control powers delegated by law to cities, villages and counties.

(f) "Water resources," where the term is used in reference to studies, plans, collection of publications on water and inquiries about water, means all water whether in the air, on the earth's surface or under the earth's surface. "Water resources" as used in connection with the regulatory functions under this section means navigable waters.

(g) "Shorelands" means the lands specified under par. (e) and s. 59.971(1).

(3)(a) The subcommittee shall serve in an ex officio advisory capacity to the department and provide a liaison function whereby the several state agencies may better co-ordinate their activities in managing and regulating water resources.

(b) The department shall make studies, establish policies and make plans for the efficient use, conservation, development and protection of the state's water resources and:

1. On the basis of these studies and plans make recommendations, through the subcommittee, to existing state agencies relative to their water resource activities.

2. Locate and maintain information relating to the state's water resources. The department shall collect pertinent data available from state, regional and federal agencies, the university of Wisconsin, local units of government and other sources.

3. Serve as a clearinghouse for information relating to water resources including referring citizens and local units of government to the appropriate sources for advice and assistance in connection with particular water use problems.

(5) (a) The department shall prepare a comprehensive plan as a guide for the application of municipal ordinances regulating navigable waters and their shorelands as defined in this section for the preventive control of pollution. The plan shall be based on a use classification of navigable waters and their shorelands throughout the state or within counties and shall be governed by the following general standards:

1. Domestic uses shall be generally preferred.

2. Uses not inherently a source of pollution within an area shall be preferred over uses that are or may be a pollution source.

3. Areas in which the existing or potential economic value of public, recreational or similar uses exceeds the existing or potential economic value of any other use shall be classified primarily on the basis of the higher economic use value.

4. Use locations within an area tending to minimize the possibility of pollution shall be preferred over use locations tending to increase that possibility.

5. Use dispersions within an area shall be preferred over concentrations of uses or their undue proximity to each other.

(b) The department shall apply to the plan the standards and criteria set forth in sub. (6).

(6) Within the purposes of sub. (1) the department shall prepare and provide to municipalities general recommended standards and criteria for navigable water protection studies and planning and for navigable water protection regulations and their administration. Such standards and criteria shall give particular attention to safe and healthful conditions for the enjoyment of aquatic recreation; the demands of water traffic, boating and water sports; the capability of the water resource; requirements necessary to assure proper operation of septic tank disposal fields near navigable waters; building setbacks from the water; preservation of shore growth and cover; conservancy uses for low lying lands; shoreland layout for residential and commercial development; suggested regulations and suggestions for the effective administration and enforcement of such regulations.

(7) The department, the municipalities and all state agencies shall mutually co-operate to accomplish the objective of this section. To that end, the department shall consult with the governing bodies of municipalities to secure voluntary uniformity of regulations, so far as practicable, and shall extend all possible assistance therefor.

(8) This section and s. 59.971 shall be construed together to accomplish the purposes and objective of this section.

(9) Sections 30.50 to 30.80 are not affected or superseded by this section.

(10) A person aggrieved by an order or decision of the department under this section may cause its review under ch. 227.

Historical Note

Source:

L.1965, c. 614, § 42.
L.1967, c. 291, § 14, eff. Feb. 18, 1968.
L.1969, c. 154, § 329, eff. Aug. 31, 1969.
L.1969, c. 276, §§ 463, 464, eff. Dec. 28, 1969.

Cross References

Boating regulation, see § 30.50 et seq.
Clean Water Restoration Act of 1966, see 33 U.S.C.A. §§ 431 et seq., 466a, 466c et seq.
Dams, municipal powers and duties, see § 31.38.
Dams and bridges, navigable waters, see § 31.01 et seq.
Drainage of lands, see § 88.01 et seq.
Icebound inland waters, local regulation, see § 30.81
Mills and milldams, regulation and control, see § 31.33.
Navigation Acts, see 33 U.S.C.A. §§ 401, 403 et seq.
Refuse Act of 1899, see 33 U.S.C.A. §§ 407, 411 et seq.
State jurisdiction on rivers and lakes, navigable waters, see Const. art. 9, § 1.
Water Quality Act of 1965, see 33 U.S.C.A. § 1151 et seq.
Water Quality Improvement Act of 1970, see 33 U.S.C.A. § 1151 notes et seq.
Zoning of shorelands on navigable waters; see § 59.971.

Administrative Code References

General requirements for waterworks, sewerage and refuse disposal, see section NR 108.01 et seq.
Interstate joint resolutions concerning pollution of interstate streams and their tributaries, see section NR 106.01.
Interstate waters, uses and designated standards, see section NR 103.01 et seq.
Reports and monitoring fees for effluents and air emissions containing industrial wastes, toxic and hazardous substances, or air contaminants, see section NR 101.01 et seq.
Shoreland management program, see section NR 115.01 et seq.
Water quality standards for interstate waters, see section NR 102.01 et seq.

Law Review Commentaries

Carrying capacity controls for recreation water uses. Jon A. Kusler. 1973 Wis.L.Rev. 1.

Current trends in Wisconsin's Water Law. J. H. Beuscher. 40 Wis.Bar Bull. 19 (April 1967).

town by failure to act within one year of the adoption of comprehensive zoning revision by the county. Racine County v. Alby (1974) 223 N.W.2d 438, 65 Wis.2d 574.

Town was not authorized to adopt zoning ordinance where county had already adopted county-wide zoning ordinance. Edelbeck v. Town of Theresa (1973) 205 N.W.2d 694.

Towns cannot have more restrictive ordinances regulating use and location of mobile homes outside mobile home parks than the county. 60 Op Atty.Gen. 131 (1971).

59.971 Zoning of shorelands on navigable waters

(1) To effect the purposes of s. 144.26 and to promote the public health, safety and general welfare, counties may, by ordinance enacted separately from ordinances pursuant to s. 59.97, zone all lands (referred to herein as shorelands) in their unincorporated areas within the following distances from the normal high-water elevation of navigable waters as defined in s. 144.26 (2) (d): 1,000 feet from a lake, pond or flowage; 300 feet from a river or stream or to the landward side of the flood plain, whichever distance is greater. If the navigable water is a glacial pothole lake, the distance shall be measured from the high watermark thereof.

(2) (a) Except as otherwise specified, all provisions of s. 59.97 apply to ordinances and their amendments enacted under this section, but they shall not require approval or be subject to disapproval by any town or town board.

(b) If an existing town ordinance relating to shorelands is more restrictive than an ordinance later enacted under this section affecting the same shorelands, it continues as a town ordinance in all respects to the extent of the greater restrictions, but not otherwise.

(c) Ordinances enacted under this section shall accord and be consistent with any comprehensive zoning plan or general zoning ordinance applicable to the enacting counties, so far as practicable.

(3) All powers granted to a county under s. 236.45 may be exercised by it with respect to shorelands, but it must have or provide a planning agency as defined in s. 236.02(1).

(4) (a) Section 66.30 applies to this section, except that for the purposes of this section any agreement under s. 66.30 shall be effected by ordinance. If the municipalities as defined in s. 144.26 are served by a regional planning commission under s. 66.945, the commission may, with its consent, be empowered by the ordinance of agreement to administer each ordinance enacted hereunder throughout its enacting municipality, whether or not the area otherwise served by the commission includes all of that municipality.

(b) Variances and appeals regarding shorelands within a county are for the board of adjustment for that county under s. 59.99, and the procedures of that section apply.

(5) An ordinance enacted under this section supersedes all provisions of an ordinance enacted under s. 59.97 that relate to shorelands.

(6) If any county does not adopt an ordinance by January 1, 1968, or if the department of natural resources, after notice and hearing, determines that a county has adopted an ordinance which fails to meet reasonable minimum standards in accomplishing the shoreland protection objectives of s. 144.26(1), the department shall adopt such an ordinance. As far as possible, s. 87.30 shall apply to this subsection.

History—
Created by—
L. 1965, c. 614, § 22.
Subsec. 6 amended by—
L. 1969, c. 276, § 588, eff. Dec. 28, 1969.

Administrative Code References
Shoreland management program, see section NR 115.01 et seq.

Law Review Commentaries
Artificial lakes and land subdivisions. Jon A. Kusler. 1971 Wis L. Rev. 369.
Carrying capacity controls for recreation water uses. Jon A. Kusler. 1973 Wis L. Rev. 1.
Current trends in Wisconsin's Water Law. J. H. Beuscher. 40 Wis. Bar Bull. 19 (April 1967).
Forty years of water pollution control in Wisconsin. Donald M. Carmichael. 1967 Wis.L.Rev. 250 (Spring).
Water quality protection for inland lakes. Jon A. Kusler. 1970 Wis.L.Rev. 35.
Zoning variance or amendments notice to department of natural resources under *shoreland zoning and navigable wa-*

APPENDIX NO. 4

Connecticut Inland Wetlands and Watercourses Act, Gen. Statutes of Conn., 1975 Revision, Chapter 440, §§22a-36 to 22a-45.

from a vehicle, the operator thereof shall be deemed prima facie to have committed such offense.

(P.A. 74-262, S. 4, 7.)

CHAPTER 440

WETLANDS AND WATER COURSES

Sec. 22a-28. *(Formerly Sec. 22-7h). Preservation of tidal wetlands. Declaration* of policy. It is declared that much of the wetlands of this state has been lost or despoiled by unregulated dredging, dumping, filling and like activities and that the remaining wetlands of this state are all in jeopardy of being lost or despoiled by these and other activities, that such loss or despoliation will adversely affect, if not entirely eliminate, the value of such wetlands as sources of nutrients to finfish, crustacea and shellfish of significant economic value; that such loss or despoliation will destroy such wetlands as habitats for plants and animals of significant economic value and will eliminate or substantially reduce marine commerce, recreation and aesthetic enjoyment; and that such loss or despoliation will, in most cases, disturb the natural ability of tidal wetlands to reduce flood damage and adversely affect the public health and welfare; that such loss or despoliation will substantially reduce the capacity of such wetlands to absorb silt and will thus result in the increased silting of channels and harbor areas to the detriment of free navigation. Therefore, it is declared to be the public policy of this state to preserve the wetlands and to prevent the despoliation and destruction thereof.

(1969, P.A. 695, S. 2.)

See Sec. 26-17a.

Former section 22-7h et seq. Cum. 161 C. 24

Sec. 22a-29. (Formerly Sec. 22-7i). Definitions. The following words and phrases, as used in sections 22a-28 to 22a-35, inclusive, shall have the following meanings: (1) "Commissioner" means the commissioner of environmental protection; (2) "wetland" means those areas which border on or lie beneath tidal waters, such as, but not limited to banks, bogs, salt marsh, swamps, meadows, flats, or other low lands subject to tidal action, including those areas now or formerly connected to tidal waters, and whose surface is at or below an elevation of one foot above local extreme high water; and upon which may grow or be capable of growing some, but not necessarily all, of the following: Salt meadow grass (Spartina patens), spike grass (Distichlis spicata), black grass (Juncus gerardi), saltmarsh grass (Spartina alterniflora), saltworts (Salicornia Europaea, and Salicornia bigelovii), Sea Lavendar (Limonium carolinianum), saltmarsh bulrushes (Scirpus robustus and Scirpus paludosus var. atlanticus), sand spurrey (Spergularia marina), switch grass (Panicum virgatum), tall cordgrass (Spartina pectinata), hightide bush (Iva frutescens var. oraria), cattails (Typha angustifolia, and Typha latifolia), spike rush (Eleocharis rostellata), chairmaker's rush (Scirpus americana), bent grass (Agrostis palustris), and sweet grass (Hierochloe odorata), royal fern (Osmunda regalis), interrupted fern (Osmunda claytoniana), cinnamon fern (Osmunda cinnamomea), sensitive fern (Onoclea sensibilis), marsh fern (Dryopteris thelypteris), bur-reed family (Sparganium eurycarpum, Sparganium androcladum, Sparganium americanum, Sparganium chlorocarpum, Sparganium angustifolium, Sparganium fluctuans,

Sparganium minimum), horned pondweed (Zannichellia palustris), water-plantain (Alisma triviale), arrowhead (Sagittaria subulata, Sagittaria graminea, Sagittaria eatoni, Sagittaria engelmanniania), wild rice (Zizania aquatica), tuckahoe (Peltandra virginica), water-arum (Calla palustris), skunk cabbage (Symplocarpus foetidus), sweet flag (Acorus calamus), pickerelweed (Pontederia cordata), water stargrass (Heteranthera dubia), soft rush (Juncus effusus), false hellebom (Veratrum viride), slender blue flag (Iris prismatica pursh), blue flag (Iris versicolor), yellow iris (Iris pseudacorus), lizard's tail (Saururus cernuus), speckled alder (Alnus rugosa), common alder (Alnus serrulata), arrow-leaved tearthumb (Polygonum sagittatum), halberd-leaved tearthumb (Polygonum arifolium), spatter-dock (Nuphar variegatum nuphar advena), marsh marigold (Caltha palustris), swamp rose (Rosa palustris), poison ivy (Rhus radicans), poison sumac (Rhus vernix), red maple (Acer rubrum); jewelweed (Impatiens capensis), marshmallow (Hibiscus palustris), loosestrife (Lythrum alatum, lythrum salicaria), red osier (Cornus stolonifera), red willow (Cornus amomum), silky dogwood (Cornus obliqua), sweet pepper-bush (Clethra alnifolia), swamp honeysuckle (Rhododendron viscosum), highbush blueberry (Vaccinium corymbosum), cranberry (Vaccinium macrocarpon), sea lavendar (Limonium nashii), climbing hemp-weed (Mikania scandens), joe pye weed (Eupatorium purpureum), joe pye weed (Eupatorium maculatum), thoroughwort (Eupatorium perfoliatum); (3) "regulated activity" means any of the following: Draining, dredging, excavation, or removal of soil, mud, sand, gravel, aggregate of any kind or rubbish from any wetland or the dumping, filling or depositing thereon of any soil, stones, sand, gravel, mud, aggregate of any kind, rubbish or similar material, either directly or otherwise, and the erection of structures, driving of pilings, or placing of obstructions, whether or not changing the tidal ebb and flow. Notwithstanding the foregoing, "regulated activity" shall not include activities conducted by the mosquito control division of the state health department, conservation activities of the state department of environmental protection, the construction or maintenance of aids to navigation which are authorized by governmental authority and the emergency decrees of any duly appointed health officer of a municipality acting to protect the public health; (4) "person" means any corporation, association or partnership, one or more individuals, and any unit of government or agency thereof.

(1969, P.A. 695, S. 1; 1971, P.A. 872, S. 400; 1972, P.A. 132, S. 1.)

Sec. 22a-30. (Formerly Sec. 22-7j). *Procedure.* (a) The commissioner or his authorized representative shall have the right to enter upon any public or private property at reasonable times to carry out the provisions of sections 22a-28 to 22a-35, inclusive. The commissioner shall promptly make an inventory of all tidal wetlands within the state. The boundaries of such wetlands shall be shown on suitable reproductions or aerial photographs to a scale of one inch equals two hundred feet with such accuracy that they will represent a class D survey. Such lines shall generally define the areas that are at or below an elevation of one foot above local extreme high water. Such maps shall be prepared to cover entire subdivisions of the state as determined by the commissioner. If, before the maps are prepared, the commissioner finds that an area is in immediate danger of being despoiled by any activity which would require a permit if such area were designated as wetland and that such area shall probably be so designated when such maps are completed, the commissioner may designate such area as wetland, provided, if such map of such area is not completed within sixty days, such designation shall be void. Upon completion of the tidal wetlands boundary maps for each subdivision, the commissioner shall hold a public

hearing. The commissioner shall give notice of such hearing to each owner of record of all lands designated as such wetland as shown on such maps by registered mail not less than thirty days prior to the date set for such hearing. The commissioner shall also cause notice of such hearing to be published at least once not more than thirty days and not fewer than ten days before the date set for such hearing in a newspaper or newspapers having a general circulation in the town or towns where such wetlands are located. After considering the testimony given at such hearing and any other facts which may be deemed pertinent and after considering the rights of affected property owners and the purposes of sections 22a-28 to 22a-35, inclusive, the commissioner shall establish by order the bounds of each of such wetlands. A copy of the order, together with a copy of the map depicting such boundary lines, shall be filed in the town clerk's office of all towns affected. The commissioner shall give notice of such order to each owner of record of all lands designated as such wetlands by mailing a copy of such order to such owner by registered mail. The commissioner shall also cause a copy of such order to be published in a newspaper or newspapers having a general circulation in the town or towns where such wetlands are located. Any person aggrieved by such order may appeal to the court of common pleas for Hartford county within thirty days after the date of such publication.

(b) The commissioner shall periodically inspect the wetlands of the state to determine the necessity for revision or correction of such tidal wetlands boundary maps. If the commissioner finds that wetland areas have been omitted from such maps or uplands have been included within designated wetland boundaries or finds that the natural processes of accretion, reliction, subsidence and erosion have rendered such maps inaccurate he shall, at intervals of two years, revise such wetland boundary maps in accordance with the provisions of subsection (a) of this section.

(1969, P.A. 695, S. 3; 1971, P.A. 46, S. 1; 138, S. 1; 870, S. 115; P.A. 74-112, S. 1, 2.)

Sec. 22a-31. (Formerly Sec. 22-7k). Hearing officers. The commissioner shall appoint such hearing officers as may be necessary to carry out the purposes of sections 22a-28 to 22a-35, inclusive.

(1969, P.A. 695, S. 4.)

Sec. 22a-32. (Formerly Sec. 22-7l). Regulated activity permit. Application. Hearing. Waiver of hearing. No regulated activity shall be conducted upon any wetland without a permit. Any person proposing to conduct or cause to be conducted a regulated activity upon any wetland shall file an application for a permit with the commissioner, in such form and with such information as the commissioner may prescribe. Such application shall include a detailed description of the proposed work and a map showing the area of wetland directly affected, with the location of the proposed work thereon, together with the names of the owners of record of adjacent land and known claimants of water rights in or adjacent to the wetland of whom the applicant has notice. The commissioner shall cause a copy of such application to be mailed to the chief administrative officer in the town or towns where the proposed work, or any part thereof, is located, and the chairman of the conservation commission and shellfish commission of the town or towns where the proposed work, or any part thereof, is located. No sooner than thirty days and not later than sixty days of the receipt of such application, the commissioner or his duly designated

hearing officer shall hold a public hearing on such application, provided, whenever the commissioner determines that the regulated activity for which a permit is sought is not likely to have a significant impact on the wetland, he may waive the requirement for public hearing after publishing notice, in a newspaper having general circulation in each town wherever the proposed work or any part thereof is located, of his intent to waive said requirement, except that the commissioner shall hold a hearing on such application upon receipt of a petition, signed by at least twenty-five persons, requesting such a hearing. The following shall be notified of the hearing by mail not less than fifteen days prior to the date set for the hearing: All of those persons and agencies who are entitled to receive a copy of such application in accordance with the terms hereof and all owners of record of adjacent land and known claimants to water rights in or adjacent to the wetland of whom the applicant has notice. The commissioner shall cause notice of such hearing to be published at least once not more than thirty days and not fewer than ten days before the date set for the hearing in the newspaper having a general circulation in each town where the proposed work, or any part thereof, is located. All applications and maps and documents relating thereto shall be open for public inspection at the office of the commissioner. At such hearing any person or persons may appear and be heard.

(1969, P.A. 695, S. 5, 6; 1971, P.A. 872, S. 401, P.A. 73-590, S. 1, 3.)

Sec. 22a-33. (Formerly Sec. 22-7m). Issuance or denial of permit. In granting, denying or limiting any permit the commissioner or his duly designated hearing officer shall consider the effect of the proposed work with reference to the public health and welfare, marine fisheries, shell-fisheries, wildlife, the protection of life and property from flood, hurricane and other natural disasters, and the public policy set forth in sections 22a-28 to 22a-35 inclusive. The fact that the department of environmental protection is in the process of acquisition of any tidal wetlands by negotiation or condemnation under the provisions of section 26-17a, shall be sufficient basis for denial of any permit. In granting a permit the commissioner may limit or impose conditions or limitations designed to carry out the public policy set forth in sections 22a-28 to 22a-35 inclusive. The commissioner may require a bond in an amount and with surety and conditions satisfactory to him securing to the state compliance with the conditions and limitations set forth in the permit. The commissioner may suspend or revoke a permit if the commissioner finds that the applicant has not complied with any of the conditions or limitations set forth in the permit or has exceeded the scope of the work as set forth in the application. The commissioner may suspend a permit if the applicant fails to comply with the terms and conditions set forth in the application. The commissioner shall state, upon his record, his findings and reasons for all actions taken pursuant to this section. The commissioner shall cause notice of his order in issuance, denial, revocation or suspension of a permit to be published in a daily newspaper having a circulation in the town or towns wherein the wetland lies.

(1969, P.A. 695, S. 7; 1971, P.A. 872, S. 402.)

Sec. 22a-34. (Formerly Sec. 22-7n). Appeal. (a) An appeal may be taken by the applicant or any person or corporation, municipal corporation or interested community group other than the applicant who has been aggrieved by such order from the denial, suspension or revocation of a permit or the issuance of a permit or conditional permit within thirty days after publication of such issuance, denial, suspension or revocation of any such permit to the court of common

pleas for Hartford county. If the court finds that the action appealed from is an unreasonable exercise of the police power, it may set aside the order. If the court so finds that the action appealed from constitutes the equivalent of a taking without compensation, and the land so regulated otherwise meets the interests and objectives of sections 22a-28 to 22a-35, inclusive, it may at the election of the commissioner (1) set aside the order or (2) proceed under the provisions of sections 48-12 to 48-14, inclusive, to award damages.

(b) Such appeal shall be brought by a complaint in writing, stating fully the reasons therefor, with a proper citation, signed by a competent authority, and shall be served upon the commissioner and upon all parties having an interest adverse to the appellant. Such appeals shall be brought to a return day of the court of common pleas for Hartford county not less than twelve or more than thirty days after the service thereof. The commissioner shall forthwith, after service of notice of any appeal, prepare and file, in said court, a copy of such portions of the record of the case from which such appeal has been taken as may appear to the commissioner to be pertinent to such appeal, with such additions as may be claimed by any party of interest to be essential thereto, certified by the commissioner. The court, upon such appeal in making its determinations as provided in subsection (a) of this section, shall review, upon the record so certified, the proceedings of the commissioner and examine the question of the legality of the action of the commissioner and the propriety of said action. If, upon hearing such appeal, it appears to the court that any testimony has been improperly excluded by the commissioner or that the facts disclosed by the record are insufficient for the equitable disposition of the appeal, it shall refer the case back to the commissioner to take such evidence as it may direct and report the same to the court, with the commissioner's findings of fact and conclusions of law. Such appeal shall have precedence in the order of trial.

(c) When the persons who should otherwise be made parties to such appeal are so numerous that it would be impracticable or unreasonably expensive to make them all parties by personal service, the court to which such appeal is taken, or, if said court is not in session, any judge of the court of common pleas, may order notice of such appeal to be given, by some method other than by personal service, to such of the parties as said court or such judge deems just and equitable, and notice so given shall operate to bind the interests of such parties on such appeal as fully as if personal service had been made upon such parties.

(1969, P.A. 695, S. 8, 9; 1971, P.A. 696, 870, S. 116; 1972, P.A. 168, S. 5.)

Subsection (a) of former section 22-7n. Cited. 161 C. 24.

Sec. 22a-35. (Formerly Sec. 22-7o). Penalty. Any person who knowingly violates any provision of sections 22a-28 to 22a-35, inclusive, shall be liable to the state for the cost of restoration of the affected wetland to its condition prior to such violation insofar as that is possible, and shall forfeit to the state a sum not to exceed one thousand dollars, to be fixed by the court, for each offense. Each violation shall be a separate and distinct offense, and, in the case of a continuing violation, each day's continuance thereof shall be deemed to be a separate and distinct offense. The attorney general, upon complaint of the commissioner, shall institute a civil action to recover such forfeiture. The superior court shall have jurisdiction in equity to restrain a continuing violation of said sections at the suit of any person or agency of state or municipal government.

(1969, P.A. 695, S. 10.)

Sec. 22a-36. Inland wetlands and water courses. Legislative finding. The inland wetlands and water courses of the state of Connecticut are an indispensable and irreplaceable but fragile natural resource with which the citizens of the state have been endowed. The wetlands and water courses are an interrelated web of nature essential to an adequate supply of surface and underground water; to hydrological stability and control of flooding and erosion; to the recharging and purification of ground water; and to the existence of many forms of animal, aquatic and plant life. Many inland wetlands and water courses have been destroyed or are in danger of destruction because of unregulated use by reason of the deposition, filling or removal of material, the diversion or obstruction of water flow, the erection of structures and other uses, all of which have despoiled, polluted and eliminated wetlands and water courses. Such unregulated activity has had, and will continue to have, a significant, adverse impact on the environment and ecology of the state of Connecticut and has and will continue to imperil the quality of the environment thus adversely affecting the ecological, scenic, historic and recreational values and benefits of the state for its citizens now and forever more. The preservation and protection of the wetlands and water courses from random, unnecessary, undesirable and unregulated uses, disturbance or destruction is in the public interest and is essential to the health, welfare and safety of the citizens of the state. It is, therefore, the purpose of sections 22a-36 to 22a-45, inclusive, to protect the citizens of the state by making provisions for the protection, preservation, maintenance and use of the inland wetlands and water courses by minimizing their disturbance and pollution; maintaining and improving water quality in accordance with the highest standards set by federal, state or local authority; preventing damage from erosion, turbidity or siltation; preventing loss of fish and other beneficial aquatic organisms, wildlife and vegetation and the destruction of the natural habitats thereof; deterring and inhibiting the danger of flood and pollution; protecting the quality of wetlands and water courses for their conservation, economic, aesthetic, recreational and other public and private uses and values; and protecting the state's potable fresh water supplies from the dangers of drought, overdraft, pollution, misuse and mismanagement by providing an orderly process to balance the need for the economic growth of the state and the use of its land with the need to protect its environment and ecology in order to forever guarantee to the people of the state, the safety of such natural resources for their benefit and enjoyment and for the benefit and enjoyment of generations yet unborn.

(1972, P.A. 155, S. 1.)

Sec. 22a-37. Short title. Sections 22a-36 to 22a-45, inclusive, shall be known and may be cited as "The Inland Wetlands and Water Courses Act."

(1972, P.A. 155, S. 2.)

Sec. 22a-38. Definitions. As used in sections 22a-36 to 22a-45, inclusive:

(1) "Commissioner" means the commissioner of environmental protection;

(2) "Person" means any person, firm, partnership, association, corporation, company, organization or legal entity of any kind, including municipal corporations, governmental agencies or subdivisions thereof;

(3) "Municipality" means any metropolitan district, town, consolidated town and city, consolidated town and borough, city, borough, village, fire and sewer district, sewer district and each municipal organization having authority to levy and collect taxes or make charges for its authorized functions;

(4) "Inland wetlands agency" means a municipal board or commission established pursuant to and acting under section 22a-42;

(5) "Soil scientist" means an individual duly qualified in accordance with standards set by the United States civil service commission;

(6) "Material" means any substance, solid or liquid, organic or inorganic, including, but not limited to soil, sediment, aggregate, land, gravel, clay, bog, mud, debris, sand, refuse or waste;

(7) "Waste" means sewage or any substance, liquid, gaseous, solid or radioactive, which may pollute or tend to pollute any of the waters of the state;

(8) "Pollution" means harmful thermal effect or the contamination or rendering unclean or impure of any waters of the state by reason of any waste or other materials discharged or deposited therein by any public or private sewer or otherwise so as directly or indirectly to come in contact with any waters;

(9) "Rendering unclean or impure" means any alteration of the physical, chemical or biological properties of any of the waters of the state, including, but not limited to change in odor, color, turbidity or taste;

(10) "Discharge" means the emission of any water, substance or material into waters of the state whether or not such substance causes pollution;

(11) "Remove" includes, but shall not be limited to drain, excavate, mine, dig, dredge, suck, bulldoze, dragline or blast;

(12) "Deposit" includes, but shall not be limited to, fill, grade, dump, place, discharge or emit;

(13) "Regulated activity" means any operation within or use of a wetland or water course involving removal or deposition of material, or any obstruction, construction, alteration or pollution, of such wetlands or water courses, but shall not include the specified activities in section 22a-40;

(14) "License" means the whole or any part of any permit, certificate of approval or similar form of permission which may be required of any person by the provisions of sections 22a-36 to 22a-45, inclusive;

(15) "Wetlands" means land, including submerged land, not regulated pursuant to sections 22a-28 to 22a-35, inclusive, which consists of any of the soil types designated as poorly drained, very poorly drained, alluvial, and flood plain by the National Cooperative Soils Survey, as may be amended from time to time, of the Soil Conservation Service of the United States Department of Agriculture;

(16) "Water courses" means rivers, streams, brooks, waterways, lakes, ponds, marshes, swamps, bogs and all other bodies of water, natural or artificial, public or private, which are contained within, flow through or border upon this state or any portion thereof, not regulated pursuant to sections 22a-28 to 22a-35, inclusive.

(1972, P.A. 155, S. 4; P.A. 73-571, S. 2; 9.)

Sec. 22a-39. *Duties of commissioner.* The commissioner shall:

(a) Exercise general supervision of the administration and enforcement of sections 22a-36 to 22a-45, inclusive;

(b) Develop comprehensive programs in furtherance of the purposes of said sections;

(c) Advise, consult and cooperate with other agencies of the state, the federal government, other states and with persons and municipalities in furtherance of the purposes of said sections;

(d) Encourage, participate in or conduct studies, investigations, research and demonstrations, and collect and disseminate information, relating to the purposes of said sections;

(e) Retain and employ consultants and assistants on a contract or other basis for rendering legal, financial, technical or other assistance and advice in furtherance of any of its purposes, specifically including, but not limited to, soil scientists on a cost-sharing basis with the United States soil conservation service for the purpose of (1) completing the state soils survey and (2) making on-site interpretations, evaluations and findings as to soil types;

(f) Promulgate such regulations as are necessary to protect the wetlands or water courses or any of them individually or collectively;

(g) Inventory or index the wetlands and water courses in such form, including pictorial representations, as the commissioner deems best suited to effectuate the purposes of sections 22a-36 to 22a-45, inclusive; and

(h) Exercise all incidental powers necessary to enforce rules and regulations and to carry out the purposes of said sections.

(1972, P.A. 155, S. 5.)

Sec. 22a-40. Permitted operations and uses. (a) The following operations and uses shall be permitted in wetlands and water courses, as of right:

(1) Grazing, farming, nurseries, gardening and harvesting of crops and farm ponds of three acres or less;

(2) A residential home (i) for which a building permit has been issued or (ii) on a subdivision lot, provided the permit has been issued or the subdivision has been approved as of the effective date of promulgation of the municipal regulations pursuant to subsection (b) of section 22a-42a;

(3) Boat anchorage or mooring;

(4) Uses incidental for the enjoyment and maintenance of residential property, such property defined as the largest minimum residential lot site permitted anywhere in the municipality, provided in any town, where there are no zoning regulations establishing minimum residential lot sites, the largest minimum lot site shall be two acres; and

(5) Construction and operation, by water companies as defined in section 16-1 or by municipal water supply systems as provided for in chapter 102, of dams, reservoirs and other facilities necessary to the impounding, storage and withdrawal of water in connection with public water supplies except as provided in sections 25-110 and 25-112.

(b) The following operations and uses shall be permitted, as a nonregulated use in wetlands and water courses, provided they do not disturb the natural and indigenous character of the land:

(1) Conservation of soil, vegetation, water, fish, shellfish and wildlife and

(2) Outdoor recreation including play and sporting areas, golf courses, field trails, nature study, hiking, horseback riding, swimming, skin diving, camping, boating, water skiing, trapping, hunting, fishing and shellfishing where otherwise legally permitted and regulated.

(1972, P.A. 155, S. 3; P.A. 73-571, S. 1, 9.)

Sec. 22a-41. Factors for consideration of commissioner. In carrying out the purposes and policies of sections 22a-36 to 22a-45, inclusive, including matters relating to regulating, licensing and enforcing of the provisions thereof, the commissioner shall take into consideration all relevant facts and circumstances, including but not limited to:

(a) The environmental impact of the proposed action;

(b) The alternatives to the proposed action;

(c) The relationship between short-term uses of the environment and the maintenance and enhancement of long-term productivity;

(d) Irreversible and irretrievable commitments of resources which would be involved in the proposed activity;

(e) The character and degree of injury to, or interference with, safety, health or the reasonable use of property which is caused or threatened; and

(f) The suitability or unsuitability of such activity to the area for which it is proposed.

(1972, P.A. 155, S. 6.)

Sec. 22a-42. Municipal regulation of wetlands and water courses. Action by

commissioner. (a) To carry out and effectuate the purposes and policies of sections 22a-36 to 22a-45, inclusive, it is hereby declared to be the public policy of the state to encourage municipal participation by means of regulation of activities affecting the wetlands and water courses within the territorial limits of the various municipalities or districts.

(b) Any municipality may acquire wetlands and water courses within its territorial limits by gift or purchase, in fee or lesser interest including, but not limited to, lease, easement or covenant, subject to such reservations and exceptions as it deems advisable.

(c) Any municipality, acting through its legislative body, may authorize any board or commission, as may be by law authorized to act, or may establish a new board or commission to promulgate such regulations, in conformity with the regulations promulgated by the commissioner pursuant to section 22a-39, as are necessary to protect the wetlands and water courses within its territorial limits. The ordinance establishing the new board or commission shall determine the number of members and alternate members, the length of their terms, the method of selection and removal and the manner for filling vacancies in the new board or commission. No member or alternate member of such board or commission shall participate in the hearing or decision of such board or commission of which he is a member upon any matter in which he is directly or indirectly interested in a personal or financial sense. In the event of such disqualification, such fact shall be entered on the records of such board or commission and replacement shall be made from alternate members of an alternate to act as a member of such commission in the hearing and determination of the particular matter or matters in which the disqualification arose. For the purposes of this section, the board or commission authorized by the municipality or district, as the case may be, shall serve as the sole agent for the licensing of regulated activities.

(d) Any municipality, pursuant to ordinance, may act through the board or commission authorized in subsection (c) of this section to join with any other municipalities in the formation of a district for the regulation of activities affecting the wetlands and water courses within such district.

(e) Municipal or district ordinances or regulations may embody any regulations promulgated hereunder, in whole or in part, or may consist of other ordinances or regulations in conformity with regulations promulgated hereunder. Any ordinances or regulations shall be for the purpose of effectuating the purposes of sections 22a-36 to 22a-45, inclusive, and, a municipality or district, in acting upon ordinances and regulations shall give due consideration to the standards set forth in section 22a-41.

(f) (1) In the event that a municipality, by January 1, 1974, does not exercise its regulatory authority pursuant to this section, the commissioner may take such action, including but not limited to the licensing of regulated activities, as is necessary to protect the wetlands and water courses within the territorial limits of such municipality. (2) In the event that a municipality, by June 30, 1974, does not exercise its regulatory authority pursuant to this section, the commissioner shall take such action, including but not limited to the licensing of regulated activities, as is necessary to protect the wetlands and water courses within the territorial limits of such municipality.

(g) Nothing contained in this section shall be construed to limit the existing authority of a municipality or any boards or commissions of the municipality.

(1972, P.A. 155, S. 7; P.A. 73-571, S. 3, 9; P.A. 74-133.)

Sec. 22a-42a. Establishment of boundaries by regulation. Adoption of regulations. Permits. (a) The inland wetlands agencies authorized in section 22a-42, shall through regulation provide for the manner in which the boundaries of inland wetland areas in their respective municipalities shall be established and amended or changed.

(b) No regulations of an inland wetlands agency including boundaries of inland wetland areas shall become effective or be established until after a public hearing in relation thereto is held by the inland wetlands agency, at which parties in interest and citizens shall have an opportunity to be heard. Notice of the time and place of such hearing shall be published in the form of a legal advertisement, appearing in a newspaper having a substantial circulation in the municipality at least twice at intervals of not less than two days, the first not more than twenty-five days nor less than fifteen days, and the last not less than two days, before such hearing, and a copy of such proposed regulation or boundary shall be filed in the office of the town, city or borough clerk as the case may be, in such municipality, for public inspection at least ten days before such hearing, and may be published in full in such paper. Such regulations and inland wetland boundaries may be from time to time; amended, changed or repealed, by majority vote of the inland wetlands agency. Regulations or boundaries or changes therein shall become effective at such time as is fixed by the inland wetlands agency, provided a copy of such regulation, boundary or change shall be filed in the office of the town, city or borough clerk, as the case may be. Whenever an inland wetland agency makes a change in regulations or boundaries it shall state upon its records the reason why the change was made. All petitions submitted in writing and in a form prescribed by the inland wetland agency, requesting a change in the regulations or the boundaries of inland wetland area shall be considered at a public hearing in the manner provided for establishment of inland wetlands regulations and boundaries within ninety days after receipt of such petition. The inland wetland agency shall act upon the changes requested in such petition within sixty days after the hearing. The petitioner may consent to extension of the periods provided for in hearing and for adoption or denial or may withdraw such petition. The inland wetlands agency may require a filing fee to be deposited with the agency to defray the cost of publication of the notice required for a hearing.

(c) On and after the effective date of the municipal regulations promulgated pursuant to subsection (b) of this section, no regulated activity shall be conducted upon any inland wetland without a permit. Any person proposing to conduct or cause to be conducted a regulated activity upon an inland wetland shall file an application with the inland wetlands agency of the town or towns wherein the wetland in question is located. The application shall be in such form and contain such information as the inland wetlands agency may prescribe. No sooner than thirty and not later than sixty days after the receipt of such application, the inland wetlands agency may hold a public hearing on such application. Notice of the hearing shall be published at least once not more than thirty days and not fewer than ten days before the date set for the hearing in a newspaper

having a general circulation in each town where the affected wetland or any part thereof, is located. All applications and maps and documents relating thereto shall be open for public inspection. At such hearing any person or persons may appear and be heard. Action shall be taken on applications within forty-five days after the completion of a public hearing or in the absence of a public hearing within sixty days from the date of receipt of the application.

(d) In granting, denying or limiting any permit for a regulated activity the inland wetlands agency shall consider the factors set forth in section 22a-41. In granting a permit the inland wetlands agency may impose conditions or limitations designed to carry out the policy of sections 22a-36 to 22a-45, inclusive. The agency may suspend or revoke a permit if it finds after giving notice to the permittee of the facts or conduct which warrant the intended action and after a hearing at which the permittee is given an opportunity to show compliance with the requirements for retention of the permit, that the applicant has not complied with the conditions or limitations set forth in the permit or has exceeded the scope of the work as set forth in the application. The applicant shall be notified of the agency's decision by certified mail within five days of the date of the decision and the agency shall cause notice of their order in issuance, denial, revocation or suspension of a permit to be published in a daily newspaper having a general circulation in the town wherein the wetland lies.

(P.A. 73-571, S. 4, 9.)

Sec. 22a-43. Appeals. Any person aggrieved by any regulation, order, decision or action made pursuant to sections 22a-36 to 22a-45, inclusive, by the commissioner, district or municipality may, within fifteen days after publication of such regulation, order, decision or action appeal to the court of common pleas for the county where the land affected is located, and if located in more than one county, to the court of common pleas in any such county. Such appeal shall be made returnable to said court in the same manner as that prescribed for civil actions brought to said court. Notice of such appeal shall be served upon the inland wetlands agency. The appeal shall state the reasons upon which it is predicated and shall not stay proceedings on the regulation, order, decision or action, but the court may on application and after notice grant a restraining order. Such appeal shall have precedence in the order of trial.

(1972, P.A. 155, S. 8, P.A. 73-571, S. 5, 9.)

Sec. 22a-43a. Findings on appeal. Setting aside or modifying action. Authority to purchase land. (a) If upon appeal pursuant to section 22a-43, the court finds that the action appealed from constitutes the equivalent of a taking without compensation, it shall set aside the action or it may modify the action so that it does not constitute a taking. In both instances the court shall remand the order to the inland wetland agency for action not inconsistent with its decision.

(b) To carry out the purposes of sections 22a-38, 22a-40, 22a-42 to 22a-43a, inclusive, 25-110 and 25-112, the commissioner, district or municipality may at any time purchase land or an interest in land in fee simple or other acceptable title, or subject to acceptable restrictions or exceptions, and enter into covenants and agreements with landowners.

(P.A. 73-571, S. 6, 9.)

Sec. 22a-44. Penalty. Court orders. Any person who commits, takes part in, or assists in any violation of any provision of sections 22a-36 to 22a-45, inclu-

sive, including regulations promulgated by the commissioner and ordinances and regulations promulgated by municipalities or districts pursuant to the grant of authority herein contained, shall be fined not more than one thousand dollars for each offense. Each violation of said sections shall be a separate and distinct offense, and, in the case of a continuing violation, each day's continuance thereof shall be deemed to be a separate and distinct offense. The superior court, in an action brought by the commissioner, municipality, district or any person, shall have jurisdiction to restrain a continuing violation of said sections and to issue orders directing that the violation be corrected or removed. All costs, fees and expenses in connection with such action shall be assessed as damages against the violator. The moneys collected pursuant to this section shall be used by the commissioner of environmental protection to restore the affected wetlands or water courses to its condition prior to the violation, wherever possible.

(1972, P.A. 155, S. 9.)

Sec. 22a-45. Property revaluation. Any owner of wetlands and water courses who may be denied a license in connection with a regulated activity affecting such wetlands and water courses, shall upon written application to the assessor, or board of assessors, of the municipality, be entitled to a revaluation of such property to reflect the fair market value thereof in light of the restriction placed upon it by the denial of such license or permit, effective with respect to the next succeeding assessment list of such municipality, provided no such revaluation shall be effective retroactively and the municipality may require as a condition therefor the conveyance of a less than fee interest to it of such land pursuant to the provisions of sections 7-131b to 7-131k, inclusive.

(1972, P.A. 155, S. 10.)

CHAPTER 441*

PESTICIDE CONTROL

(Effective October 1, 1974.)

Sec. 22a-46. Short title. This chapter, subsection (a) of section 23-61a, sections 23-61b to 23-61d, inclusive, and 23-61f may be cited as the "Connecticut Pesticide Control Act."

(P.A. 73-640, S. 1, 28.)

Sec. 22a-47. Definitions. For purposes of this chapter, subsection (a) of section 23-61a, sections 23-61b to 23-61d, inclusive, and 23-61f:

(a) "Active ingredient" means:

(1) In the case of a pesticide other than a plant regulator, defoliant, or desiccant, an ingredient which will prevent, destroy, repel, or mitigate any pest;

(2) In the case of a plant regulator, an ingredient which, through

*See also Secs. 23-61a (d), 23-61b to 23-61d, inclusive, 23-61f.

APPENDIX NO. 5

Minnesota Wild and Scenic Rivers Act, M.S.A. 104.31 to 104.40; 1976 Pocket Part

104.31 Wild and scenic rivers act

Sections 104.31 to 104.40 may be cited as the "Minnesota wild and scenic rivers act."

Laws 1973, c. 271, § 1.

104.32 Policy

The legislature finds that certain of Minnesota's rivers and their adjacent lands possess outstanding scenic, recreational, natural, historical, scientific and similar values. Because it is in the interest of present and future generations to retain these values, it is hereby declared to be a policy of Minnesota and an authorized public purpose to preserve and protect these rivers.

Laws 1973, c. 271, § 2.

Law Review Commentaries
Public water rights. William G. Peterson, 31 Bench and Bar No. 3, p. 19 (Sept.1974).

104.33 System; criteria for inclusion

Subdivision 1. The whole or a segment of any river and its adjacent lands in this state that possesses outstanding scenic, recreational, natural, historical, scientific, or similar values shall be eligible for inclusion within the Minnesota wild and scenic rivers system. "River" means a flowing body of water such as a stream or a segment or tributary thereof, and may include lakes through which the river or stream flows.

Subd. 2. Rivers or segments thereof included within the system shall be classified as wild, scenic, or recreational.

(a) "Wild" rivers are those rivers that exist in a free-flowing state, with excellent water quality, and with adjacent lands that are essentially primitive. "Free-flowing" means existing in natural condition without significant artificial modification such as impoundment, diversion, or straightening. The existence, however, of low dams, diversion works or other minor structures at the time any river is proposed for inclusion shall not automatically bar its inclusion as a wild, scenic, or recreational river.

(b) "Scenic" rivers are those rivers that exist in a free-flowing state and with adjacent lands that are largely undeveloped.

(c) "Recreational" rivers are those rivers that may have undergone some impoundment or diversion in the past and may have adjacent lands that are considerably developed, but that are still capable of being managed so as to further the purposes of sections 104.31 to 104.40.

Laws 1973, c. 271, § 3.

104.34 Commissioner's duties

Subdivision 1. The commissioner of natural resources shall be responsible for administering the wild and scenic rivers system and his duties shall include but not be limited to conducting studies, developing criteria for classification and designation of rivers, designating rivers for inclusion within the system, and management of the components of the system including promulgation of regulations with respect thereto.

Subd. 2. The commissioner shall promulgate, in the manner provided in chapter 15, statewide minimum standards and criteria for the preservation and protection of shorelands within the boundaries of wild, scenic, and recreational rivers. Such standards and criteria (a) may include but need not be limited to the matters covered in the commissioner's standards and criteria for shoreland areas, as set out in section 105.485, except that the distance limitations contained in section 105.485 do not apply to standards and criteria for wild, scenic, and recreational rivers; (b) shall further the purposes of sections 104.31 to 104.40 and of the classifications of rivers established hereunder; and (c) shall apply to the same local governments as are or may hereafter be specified in section 105.485.

Laws 1973, c. 271, § 4.

104.35 Management plans; hearing; establishment

Subdivision 1. For each river proposed to be included in the wild and scenic rivers system, the commissioner shall prepare a management plan, with no unreasonable restrictions upon compatible, pre-existing, economic uses of particular tracts of land to preserve and enhance the values that cause the river to be proposed for inclusion in the system. The plan shall give primary emphasis to the area's scenic, recreational, natural, historical, scientific and similar values. The plan shall set forth the proposed classification of the river and segments thereof, and the boundaries of the area along the river to be included within the system. The boundaries shall include not more than 320 acres per mile on both sides of the river. The plan shall include proposed regulations governing the use of public lands and waters within the area, which may differ from any such statewide regulations to the extent necessary to take account of the particular attributes of the area. The plan may include proposed standards and criteria adopted pursuant to section 104.34 for local land use controls that differ from the statewide standards and

criteria to the extent necessary to take account of the particular attributes of the area.

Subd. 2. The commissioner shall make the proposed management plan available to affected local governmental bodies, shoreland owners, conservation and outdoor recreation groups, and the general public. Not less than sixty days after making such information available, the commissioner shall conduct a public hearing on the proposed management plan in the county seat of each county which contains a portion of the designated area, in the manner provided in chapter 15.

Subd. 3. Following the public hearing, and such additional public hearings as the commissioner shall deem necessary, and following review by the state planning agency as required by section 86A.09, he may by order designate the river or segment thereof as a wild, scenic, or recreational river and shall adopt a management plan to govern the area. The commissioner shall notify and inform public agencies and private landowners of the plan and its purposes so as to encourage their cooperation in the management and use of their land in a manner consistent with the plan and its purposes.

Subd. 4. The legislature may at any time designate additional rivers to be included within the system, delete rivers previously included in the system, or change the classification of rivers theretofore classified by the commissioner. Laws 1973, c. 271, § 5. Amended by Laws 1975, c. 353, § 21.

104.36 Local land use ordinances

Subdivision 1. Within six months after establishment of a wild, scenic, or recreational river area, each local government containing any portion thereof shall adopt or amend its local ordinances and land use district maps to the extent necessary to comply with the standards and criteria of the commissioner and the management plan. If a local government fails to adopt adequate ordinances, maps, or amendments thereto within six months, the commissioner shall adopt such ordinances, maps, or amendments in the manner and with the effect specified in section 105.485, subdivisions 4 and 5.

Subd. 2. The commissioner shall assist local governments in the preparation, implementation and enforcement of the ordinances required herein, within the limits of available appropriations and personnel.
Laws 1973, c. 271, § 6.

104.37 Acquisition of interests in land; development

Subdivision 1. To further the purposes of sections 104.31 to 104.40, the commissioner of administration, for the commissioner of natural resources, may acquire the title, scenic easements or other interests in land, by purchase, grant, gift, devise, exchange, lease, or other lawful means. "Scenic easement" means an interest in land, less than the fee title, which limits the use of such land for the purpose of protecting the scenic, recreational, or natural characteristics of a wild, scenic or recreational river area. Unless otherwise expressly and specifically provided by the parties, such easement shall be (a) perpetually held for the benefit of the people of Minnesota; (b) specifically enforceable by its holder or any beneficiary; and (c) binding upon the holder of the servient estate, his heirs, successors and assigns. Unless specifically provided by the parties, no such easement shall give the holder or any beneficiary the right to enter on the land except for enforcement of the easement.

Subd. 2. The commissioner of natural resources may designate and develop appropriate areas of public land along wild, scenic, and recreational rivers as water waysides for facilities compatible with the class of river, including, as appropriate, primitive campsites, picnic sites, portages, water access sites, sanitation facilities, and interpretive display.

Subd. 3. The commissioner of natural resources may mark canoe and boating routes along a wild, scenic, or recreational river, consistent with the classification and characteristics of the river, including points of interest, portages, campsites, dams, rapids, waterfalls, whirlpools, and other hazards

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104.39 Federal

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104.40 Conflict

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to navigation. Canoe routes, boating routes, campsites, and portages marked under this subdivision shall not be subject to the provisions of section 160.06.

Subd. 4. The commissioner of natural resources may designate all or a portion of a state wild, scenic, or recreational river that possesses the necessary qualifications as a state trout stream, and make habitat improvement as may be necessary, desirable, and consistent with the classification of the river.

Laws 1973, c. 271, § 7. Amended by Laws 1975, c. 353, § 22.

104.38 Responsibilities of other governmental units

All state, local and special governmental units, councils, commissions, boards, districts, agencies, departments and other authorities shall exercise their powers so as to further the purposes of sections 104.31 to 104.40 and management plans adopted by the commissioner hereunder. Land owned by the state, its agencies and subdivisions shall be administered in accordance with the management plan, and no land owned by such governmental bodies within the designated boundaries of a wild, scenic or recreational river area shall be transferred to any other person or entity if such transfer would be inconsistent with such plan.

Laws 1973, c. 271, § 8.

104.39 Federal-state relations

Nothing in sections 104.31 to 104.40 shall preclude a river in the Minnesota wild and scenic rivers system from becoming a part of the federal wild and scenic rivers system as established in the wild and scenic rivers act, Public Law 90-542; 16 United States Code Section 1271 et seq., as amended. The commissioner is authorized to seek, alone or in conjunction with other governmental authorities, financial and technical assistance from the federal government and to enter into written cooperative agreements for the joint administration of a Minnesota river in the federal wild and scenic rivers system.

Laws 1973, c. 271, § 9.

104.40 Conflict with other laws

Each river in the wild and scenic rivers system shall be subject to the provisions of sections 104.31 to 104.40, provided that in case of conflict with some other law of this state the more protective provision shall apply.

Laws 1973, c. 271, § 10.

APPENDIX NO. 6

Washington Shoreline Management Act of 1971, R.C.W. 90.58.010 to 90.58.930 (1974).

Chapter 90.58
SHORELINE MANAGEMENT ACT OF 1971

ions

8.010 Short title.
8.020 Legislative findings——State policy enunciated——Use preference.
8.030 Definitions and concepts.
8.040 Program applicable to shorelines of the state.
8.050 Program as cooperative between local government and state——Responsibilities differentiated.
8.060 Timetable for adoption of initial guidelines——Public hearings, notice of.
8.070 Local governments to submit letters of intent——Department to act upon failure of local government.
8.080 Timetable for local governments to complete shoreline inventories and master programs.
8.090 Approval of master program or segments thereof, when——Departmental alternatives when shorelines of state-wide significance——Later adoption of master program supersedes departmental program.
.100 Programs as constituting use regulations——Duties when preparing programs and amendments thereto——Program contents.
.110 Development of program within two or more adjacent local government jurisdictions——Development of program in segments, when.
.120 Adoption of rules, programs, etc., subject to RCW 34.04.025——Public hearings, notice of——Public inspection after approval or adoption.
.130 Involvement of all persons and entities having interest, means.
90.58.140 Development permits——Grounds for granting——Departmental appeal on issuance——Administration by local government, conditions——Rescission——When permits not required——Approval when permit for variance or conditional use.
90.58.150 Selective commercial timber cutting, when.
90.58.160 Prohibition against surface drilling for oil or gas, where.
90.58.170 Shorelines hearings board——Established——Members——Chairman——Quorum for decision——Administrative and clerical assistance——Expenses of members.
90.58.175 Rules and regulations.
90.58.180 Appeals from granting, denying or rescinding permits, procedure——Board to act, when——Local government appeals to board——Grounds for declaring master program invalid——Appeals to court, procedure.
90.58.190 Review and adjustments to master programs.
90.58.200 Rules and regulations.
90.58.210 Court actions to insure against conflicting uses and to enforce.
90.58.220 General penalty.
90.58.230 Violators liable for damages resulting from violation——Attorney's fees and costs.
90.58.240 Additional authority granted department and local governments.
90.58.250 Department to cooperate with local governments——Grants for development of master programs.
90.58.260 State to represent its interest before federal agencies, interstate agencies and courts.
90.58.270 Nonapplication to certain structures, docks, developments, etc., placed in navigable waters——Nonapplication to certain rights of action, authority.
90.58.280 Application to all state agencies, counties, public and municipal corporations.
90.58.290 Restrictions as affecting fair market value of property.
90.58.300 Department as regulating state agency——Special authority.
90.58.310 Designation of shorelines of state-wide significance by legislature——Recommendation by director, procedure.
90.58.320 Height limitation respecting permits.
90.58.330 Study of shorelines of cities and towns submitted to legislature——Scope.
90.58.340 Use policies for land adjacent to shorelines, development of.
90.58.350 Nonapplication to treaty rights.
90.58.360 Existing requirements for permits, certificates, etc., not obviated.
90.58.900 Liberal construction——1971 ex.s. c 286.
90.58.910 Severability——1971 ex.s. c 286.
90.58.920 Effective date——1971 ex.s. c 286.
90.58.930 Referendum to the people——1971 ex.s. c 286——Determining if act continues in force and effect.

Marine oil pollution——Baseline study program: RCW 43.21A.405-43.21A.420.

90.58.010 **Short title.** This chapter shall be known and may be cited as the "Shoreline Management Act of 1971". [1971 ex.s. c 286 § 1.]

90.58.020 **Legislative findings——State policy enunciated——Use preference.** The legislature finds that the shorelines of the state are among the most valuable and fragile of its natural resources and that there is great concern throughout the state relating to their utilization, protection, restoration, and preservation. In addition it finds that ever increasing pressures of additional uses are being placed on the shorelines necessitating increased coordination in the management and development of the shorelines of the state. The legislature further finds that much of the shorelines of the state

id the uplands adjacent thereto are in private owner-ip; that unrestricted construction on the privately ned or publicly owned shorelines of the state is not the best public interest; and therefore, coordinated anning is necessary in order to protect the public in-est associated with the shorelines of the state while, the same time, recognizing and protecting private operty rights consistent with the public interest. There therefor, a clear and urgent demand for a planned, tional, and concerted effort, jointly performed by fed-l, state, and local governments, to prevent the inher-t harm in an uncoordinated and piecemeal velopment of the state's shorelines.

It is the policy of the state to provide for the man-ement of the shorelines of the state by planning for d fostering all reasonable and appropriate uses. This licy is designed to insure the development of these orelines in a manner which, while allowing for limited duction of rights of the public in the navigable waters, ll promote and enhance the public interest. This poli-contemplates protecting against adverse effects to the blic health, the land and its vegetation and wildlife, d the waters of the state and their aquatic life, while otecting generally public rights of navigation and ollary rights incidental thereto.

The legislature declares that the interest of all of the ople shall be paramount in the management of orelines of state-wide significance. The department, adopting guidelines for shorelines of state-wide sig-icance, and local government, in developing master ograms for shorelines of state-wide significance, shall e preference to uses in the following order of prefer-ce which:

(1) Recognize and protect the state-wide interest over al interest;

(2) Preserve the natural character of the shoreline;

(3) Result in long term over short term benefit;

(4) Protect the resources and ecology of the shoreline;

(5) Increase public access to publicly owned areas of shorelines;

(6) Increase recreational opportunities for the public the shoreline;

(7) Provide for any other element as defined in RCW .58.100 deemed appropriate or necessary.

In the implementation of this policy the public's op-rtunity to enjoy the physical and aesthetic qualities of tural shorelines of the state shall be preserved to the atest extent feasible consistent with the overall best erest of the state and the people generally. To this d uses shall be preferred which are consistent with ntrol of pollution and prevention of damage to the tural environment, or are unique to or dependent on use of the state's shoreline. Alterations of the nat-l condition of the shorelines of the state, in those ited instances when authorized, shall be given prior-for single family residences, ports, shoreline recrea-nal uses including but not limited to parks, marinas, rs, and other improvements facilitating public access shorelines of the state, industrial and commercial de-opments which are particularly dependent on their ation on or use of the shorelines of the state and er development that will provide an opportunity for substantial numbers of the people to enjoy the shorelines of the state.

Permitted uses in the shorelines of the state shall be designed and conducted in a manner to minimize, insofar as practical, any resultant damage to the ecology and environment of the shoreline area and any interference with the public's use of the water. [1971 ex.s. c 286 § 2.]

Reviser's note: In subsection (7), a literal translation of the session law's reference ". . . section 11 of this 1971 act. . ." would read "RCW 90.58.110". The above reference to "RCW 90.58.100" which codifies section 10 of this act is believed proper in that (1) section 10 lists the elements includable within the master programs while section 11 neither defines nor mentions such elements, and (2) in the course of passage of the bill, section 7 was deleted causing old section 11 to be renumbered section 10, but the above reference was not amended in consonance with the renumbering.

90.58.030 Definitions and concepts. As used in this chapter, unless the context otherwise requires, the following definitions and concepts apply:

(1) Administration:

(a) "Department" means the department of ecology;

(b) "Director" means the director of the department of ecology;

(c) "Local government" means any county, incorporated city, or town which contains within its boundaries any lands or waters subject to this chapter;

(d) "Person" means an individual, partnership, corporation, association, organization, cooperative, public or municipal corporation, or agency of the state or local governmental unit however designated;

(e) "Hearing board" means the shoreline hearings board established by this chapter.

(2) Geographical:

(a) "Extreme low tide" means the lowest line on the land reached by a receding tide;

(b) "Ordinary high water mark" on all lakes, streams, and tidal water is that mark that will be found by examining the bed and banks and ascertaining where the presence and action of waters are so common and usual, and so long continued in all ordinary years, as to mark upon the soil a character distinct from that of the abutting upland, in respect to vegetation as that condition exists on June 1, 1971 or as it may naturally change thereafter: *Provided*, That in any area where the ordinary high water mark cannot be found, the ordinary high water mark adjoining salt water shall be the line of mean higher high tide and the ordinary high water mark adjoining fresh water shall be the line of mean high water;

(c) "Shorelines of the state" are the total of all "shorelines" and "shorelines of state-wide significance" within the state;

(d) "Shorelines" means all of the water areas of the state, including reservoirs, and their associated wetlands, together with the lands underlying them; except (i) shorelines of state-wide significance; (ii) shorelines on segments of streams upstream of a point where the mean annual flow is twenty cubic feet per second or less and the wetlands associated with such upstream segments; and (iii) shorelines on lakes less than twenty

acres in size and wetlands associated with such small lakes;

(e) "Shorelines of state-wide significance" means the following shorelines of the state:

(i) The area between the ordinary high water mark and the western boundary of the state from Cape Disappointment on the south to Cape Flattery on the north, including harbors, bays, estuaries, and inlets;

(ii) Those areas of Puget Sound and adjacent salt waters and the Strait of Juan de Fuca between the ordinary high water mark and the line of extreme low tide as follows:

(A) Nisqually Delta——from DeWolf Bight to Tatsolo Point,

(B) Birch Bay——from Point Whitehorn to Birch Point,

(C) Hood Canal——from Tala Point to Foulweather Bluff,

(D) Skagit Bay and adjacent area——from Brown Point to Yokeko Point, and

(E) Padilla Bay——from March Point to William Point;

(iii) Those areas of Puget Sound and the Strait of Juan de Fuca and adjacent salt waters north to the Canadian line and lying seaward from the line of extreme low tide;

(iv) Those lakes, whether natural, artificial or a combination thereof, with a surface acreage of one thousand acres or more measured at the ordinary high water mark;

(v) Those natural rivers or segments thereof as follows:

(A) Any west of the crest of the Cascade range downstream of a point where the mean annual flow is measured at one thousand cubic feet per second or more,

(B) Any east of the crest of the Cascade range downstream of a point where the annual flow is measured at two hundred cubic feet per second or more, or those portions of rivers east of the crest of the Cascade range downstream from the first three hundred square miles of drainage area, whichever is longer;

(vi) Those wetlands associated with (i), (ii), (iv), and (v) of this subsection (2)(e);

(f) "Wetlands" or "wetland areas" means those lands extending landward for two hundred feet in all directions as measured on a horizontal plane from the ordinary high water mark; and all marshes, bogs, swamps, floodways, river deltas, and flood plains associated with the streams, lakes and tidal waters which are subject to the provisions of this chapter; the same to be designated as to location by the department of ecology.

(3) Procedural terms:

(a) "Guidelines" means those standards adopted to implement the policy of this chapter for regulation of use of the shorelines of the state prior to adoption of master programs. Such standards shall also provide criteria to local governments and the department in developing master programs;

(b) "Master program" shall mean the comprehensive use plan for a described area, and the use regulations together with maps, diagrams, charts or other descriptive material and text, a statement of desired goals and standards developed in accordance with the policies enunciated in RCW 90.58.020;

(c) "State master program" is the cumulative total of all master programs approved or adopted by the department of ecology;

(d) "Development" means a use consisting of the construction or exterior alteration of structures; dredging; drilling; dumping; filling; removal of any sand, gravel or minerals; bulkheading; driving of piling; placing of obstructions; or any project of a permanent or temporary nature which interferes with the normal public use of the surface of the waters overlying lands subject to this chapter at any state of water level;

(e) "Substantial development" shall mean any development of which the total cost or fair market value exceeds one thousand dollars, or any development which materially interferes with the normal public use of the water or shorelines of the state; except that the following shall not be considered substantial developments for the purpose of this chapter:

(i) Normal maintenance or repair of existing structures or developments, including damage by accident, fire or elements;

(ii) Construction of the normal protective bulkhead common to single family residences;

(iii) Emergency construction necessary to protect property from damage by the elements;

(iv) Construction of a barn or similar agricultural structure on wetlands;

(v) Construction or modification of navigational aids such as channel markers and anchor buoys;

(vi) Construction on wetlands by an owner, lessee or contract purchaser of a single family residence for his own use or for the use of his family, which residence does not exceed a height of thirty-five feet above average grade level and which meets all requirements of the state agency or local government having jurisdiction thereof, other than requirements imposed pursuant to this chapter;

(vii) Construction of a dock, designed for pleasure craft only, for the private noncommercial use of the owner, lessee or contract purchaser of a single family residence, the cost of which does not exceed two thousand five hundred dollars. [1973 1st ex.s. c 203 § 1; 1971 ex.s. c 286 § 3.]

90.58.040 Program applicable to shorelines of the state. The shoreline management program of this chapter shall apply to the shorelines of the state as defined in this chapter. [1971 ex.s. c 286 § 4.]

90.58.050 Program as cooperative between local government and state——Responsibilities differentiated. This chapter establishes a cooperative program of shoreline management between local government and the state. Local government shall have the primary responsibility for initiating and administering the regulatory program of this chapter. The department shall act

arily in a supportive and review capacity with pri- y emphasis on insuring compliance with the policy provisions of this chapter. [1971 ex.s. c 286 § 5.]

.58.060 Timetable for adoption of initial guide- s——Public hearings, notice of. (1) Within one hun- l twenty days from June 1, 1971, the department ll submit to local governments proposed guidelines sistent with RCW 90.58.020 for:

) Development of master programs for regulation of uses of shorelines; and

) Development of master programs for regulation he uses of shorelines of state-wide significance.

) Within sixty days from receipt of such proposed lelines, local governments shall submit to the de- ment in writing proposed changes, if any, and com- ts upon the proposed guidelines.

) Thereafter and within one hundred twenty days n the submission of such proposed guidelines to lo- governments, the department, after review and con- ration of the comments and suggestions submitted shall resubmit final proposed guidelines.

) Within sixty days thereafter public hearings shall eld by the department in Olympia and Spokane, at ch interested public and private parties shall have opportunity to present statements and views on the osed guidelines. Notice of such hearings shall be lished at least once in each of the three weeks im- diately preceding the hearing in one or more news- ers of general circulation in each county of the state.

) Within ninety days following such public hear- , the department at a public hearing to be held in mpia shall adopt guidelines. [1971 ex.s. c 286 § 6.]

.58.070 Local governments to submit letters of in- ——Department to act upon failure of local govern- . (1) Local governments are directed with regard to elines of the state in their various jurisdictions to mit to the director of the department, within six ths from June 1, 1971, letters stating that they pro- to complete an inventory and develop master pro- ns for these shorelines as provided for in RCW 8.080.

) If any local government fails to submit a letter as ided in subsection (1) of this section, or fails to pt a master program for the shorelines of the state in its jurisdiction in accordance with the time dule provided in this chapter, the department shall y out the requirements of RCW 90.58.080 and pt a master program for the shorelines of the state in the jurisdiction of the local government. [1971 c 286 § 7.]

.58.080 Timetable for local governments to com- shoreline inventories and master programs. Local rnments are directed with regard to shorelines of state within their various jurisdictions as follows:

) To complete within eighteen months after June 1, 1, a comprehensive inventory of such shorelines. n inventory shall include but not be limited to the ral ownership patterns of the lands located therein erms of public and private ownership, a survey of the general natural characteristics thereof, present uses conducted therein and initial projected uses thereof;

(2) To develop, within twenty-four months after the adoption of guidelines as provided in RCW 90.58.060, a master program for regulation of uses of the shorelines of the state consistent with the guidelines adopted. [1974 1st ex.s. c 61 § 1; 1971 ex.s. c 286 § 8.]

90.58.090 Approval of master program or segments thereof, when——Departmental alternatives when shorelines of state-wide significance——Later adoption of master program supersedes departmental program. Master programs or segments thereof shall become effective when adopted or approved by the department as appropriate. Within the time period provided in RCW 90.58.080, each local government shall have submitted a master program, either totally or by segments, for all shorelines of the state within its jurisdiction to the department for review and approval.

(1) As to those segments of the master program relating to shorelines, they shall be approved by the department unless it determines that the submitted segments are not consistent with the policy of RCW 90.58.020 and the applicable guidelines. If approval is denied, the department shall state within ninety days from the date of submission in detail the precise facts upon which that decision is based, and shall submit to the local government suggested modifications to the program to make it consistent with said policy and guidelines. The local government shall have ninety days after it receives recommendations from the department to make modifications designed to eliminate the inconsistencies and to resubmit the program to the department for approval. Any resubmitted program shall take effect when and in such form and content as is approved by the department.

(2) As to those segments of the master program relating to shorelines of state-wide significance the department shall have full authority following review and evaluation of the submission by local government to develop and adopt an alternative to the local government's proposal if in the department's opinion the program submitted does not provide the optimum implementation of the policy of this chapter to satisfy the state-wide interest. If the submission by local government is not approved, the department shall suggest modifications to the local government within ninety days from receipt of the submission. The local government shall have ninety days after it receives said modifications to consider the same and resubmit a master program to the department. Thereafter, the department shall adopt the resubmitted program or, if the department determines that said program does not provide for optimum implementation, it may develop and adopt an alternative as hereinbefore provided.

(3) In the event a local government has not complied with the requirements of RCW 90.58.070 it may thereafter upon written notice to the department elect to adopt a master program for the shorelines within its jurisdiction, in which event it shall comply with the provisions established by this chapter for the adoption of a master program for such shorelines.

Upon approval of such master program by the department it shall supersede such master program as may have been adopted by the department for such shorelines. [1971 ex.s. c 286 § 9.]

90.58.100 Programs as constituting use regulations——Duties when preparing programs and amendments thereto——Program contents. (1) The master programs provided for in this chapter, when adopted and approved by the department, as appropriate, shall constitute use regulations for the various shorelines of the state. In preparing the master programs, and any amendments thereto, the department and local governments shall to the extent feasible:

(a) Utilize a systematic interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts;

(b) Consult with and obtain the comments of any federal, state, regional, or local agency having any special expertise with respect to any environmental impact;

(c) Consider all plans, studies, surveys, inventories, and systems of classification made or being made by federal, state, regional, or local agencies, by private individuals, or by organizations dealing with pertinent shorelines of the state;

(d) Conduct or support such further research, studies, surveys, and interviews as are deemed necessary;

(e) Utilize all available information regarding hydrology, geography, topography, ecology, economics, and other pertinent data;

(f) Employ, when feasible, all appropriate, modern scientific data processing and computer techniques to store, index, analyze, and manage the information gathered.

(2) The master programs shall include, when appropriate, the following:

(a) An economic development element for the location and design of industries, transportation facilities, port facilities, tourist facilities, commerce and other developments that are particularly dependent on their location on or use of the shorelines of the state;

(b) A public access element making provision for public access to publicly owned areas;

(c) A recreational element for the preservation and enlargement of recreational opportunities, including but not limited to parks, tidelands, beaches, and recreational areas;

(d) A circulation element consisting of the general location and extent of existing and proposed major thoroughfares, transportation routes, terminals, and other public utilities and facilities, all correlated with the shoreline use element;

(e) A use element which considers the proposed general distribution and general location and extent of the use on shorelines and adjacent land areas for housing, business, industry, transportation, agriculture, natural resources, recreation, education, public buildings and grounds, and other categories of public and private uses of the land;

(f) A conservation element for the preservation of natural resources, including but not limited to scenic vistas, aesthetics, and vital estuarine areas for fisheries and wildlife protection;

(g) An historic, cultural, scientific, and educational element for the protection and restoration of buildings, sites, and areas having historic, cultural, scientific, or educational values; and

(h) Any other element deemed appropriate or necessary to effectuate the policy of this chapter.

(3) The master programs shall include such map or maps, descriptive text, diagrams and charts, or other descriptive material as are necessary to provide for ease of understanding.

(4) Master programs will reflect that state-owned shorelines of the state are particularly adapted to providing wilderness beaches, ecological study areas, and other recreational activities for the public and will give appropriate special consideration to same.

(5) Each master program shall contain provisions to allow for the varying of the application of use regulations of the program, including provisions for permits for conditional uses and variances, to insure that strict implementation of a program will not create unnecessary hardships or thwart the policy enumerated in RCW 90.58.020. Any such varying shall be allowed only if extraordinary circumstances are shown and the public interest suffers no substantial detrimental effect. The concept of this subsection shall be incorporated in the rules adopted by the department relating to the establishment of a permit system as provided in RCW 90.58.140(3). [1971 ex.s. c 286 § 10.]

90.58.110 Development of program within two or more adjacent local government jurisdictions——Development of program in segments, when. (1) Whenever it shall appear to the director that a master program should be developed for a region of the shorelines of the state which includes lands and waters located in two or more adjacent local government jurisdictions, the director shall designate such region and notify the appropriate units of local government thereof. It shall be the duty of the notified units to develop cooperatively an inventory and master program in accordance with and within the time provided in RCW 90.58.080.

(2) At the discretion of the department, a local government master program may be adopted in segments applicable to particular areas so that immediate attention may be given to those areas of the shorelines of the state in most need of a use regulation. [1971 ex.s. c 286 § 11.]

90.58.120 Adoption of rules, programs, etc., subject to RCW 34.04.025——Public hearings, notice of——Public inspection after approval or adoption. All rules and regulations, master programs, designations and guidelines, shall be adopted or approved in accordance with the provisions of RCW 34.04.025 insofar as such provisions are not inconsistent with the provisions of this chapter. In addition:

(1) Prior to the approval or adoption by the department of a master program, or portion thereof, at least one public hearing shall be held in each county affected

a program or portion thereof for the purpose of ob-ing the views and comments of the public. Notice of h such hearing shall be published at least once in h of the three weeks immediately preceding the ring in one or more newspapers of general circula-in the county in which the hearing is to be held.

2) All guidelines, regulations, designations or master grams adopted or approved under this chapter shall available for public inspection at the office of the artment or the appropriate county auditor and city k. The terms "adopt" and "approve" for purposes of section, shall include modifications and rescission uidelines. [1971 ex.s. c 286 § 12.]

0.58.130 Involvement of all persons and entities ng interest, means. To insure that all persons and ties having an interest in the guidelines and master grams developed under this chapter are provided a full opportunity for involvement in both their elopment and implementation, the department and l governments shall:

) Make reasonable efforts to inform the people of state about the shoreline management program of chapter and in the performance of the responsibili-provided in this chapter, shall not only invite but vely encourage participation by all persons and pri-groups and entities showing an interest in shoreline agement programs of this chapter; and

) Invite and encourage participation by all agencies ederal, state, and local government, including mu-pal and public corporations, having interests or re-sibilities relating to the shorelines of the state. State local agencies are are directed to participate fully sure that their interests are fully considered by the artment and local governments. [1971 ex.s. c 286 §

.58.140 Development permits——Grounds for ting——Departmental appeal on issuance——Ad-istration by local government, conditions——Rescis-When permits not required——Approval when for variance or conditional use. (1) No develop-t shall be undertaken on the shorelines of the state pt those which are consistent with the policy of this ter and, after adoption or approval, as appropriate, applicable guidelines, regulations or master ram.

) No substantial development shall be undertaken horelines of the state without first obtaining a per-from the government entity having administrative diction under this chapter.

permit shall be granted:

) From June 1, 1971 until such time as an applica-aster program has become effective, only when the lopment proposed is consistent with: (i) The policy CW 90.58.020; and (ii) after their adoption, the elines and regulations of the department; and (iii) ar as can be ascertained, the master program being loped for the area. In the event the department is he opinion that any permit granted under this sub-ion is inconsistent with the policy declared in RCW 8.020 or is otherwise not authorized by this section, the department may appeal the issuance of such permit within thirty days to the hearings board upon written notice to the local government and the permittee;

(b) After adoption or approval, as appropriate, by the department of an applicable master program, only when the development proposed is consistent with the applicable master program and the policy of RCW 90.58.020.

(3) Local government shall establish a program, consistent with rules adopted by the department, for the administration and enforcement of the permit system provided in this section. Any such system shall include a requirement that all applications and permits shall be subject to the same public notice procedures as provided for applications for waste disposal permits for new operations under RCW 90.48.170. The administration of the system so established shall be performed exclusively by local government.

(4) Such system shall include provisions to assure that construction pursuant to a permit will not begin or be authorized until forty-five days from the date of final approval by the local government or, except in the case of any permit issued to the state of Washington, department of highways, for the construction and modification of the SR 90 (I-90) bridges across Lake Washington, until all review proceedings are terminated if such proceedings were initiated within forty-five days from the date of final approval by the local government.

(5) Any ruling on an application for a permit under authority of this section, whether it be an approval or a denial, shall, concurrently with the transmittal of the ruling to the applicant, be filed with the department and the attorney general.

(6) Applicants for permits under this section shall have the burden of proving that a proposed substantial development is consistent with the criteria which must be met before a permit is granted. In any review of the granting or denial of an application for a permit as provided in RCW 90.58.160(1), the person requesting the review shall have the burden of proof.

(7) Any permit may be rescinded by the issuing authority upon the finding that a permittee has not complied with conditions of a permit. In the event the department is of the opinion that such noncompliance exists, the department may appeal within thirty days to the hearings board for a rescission of such permit upon written notice to the local government and the permittee.

(8) The holder of a certification from the governor pursuant to chapter 80.50 RCW shall not be required to obtain a permit under this section.

(9) No permit shall be required for any development on shorelines of the state included within a preliminary or final plat approved by the applicable state agency or local government prior to April 1, 1971, if:

(a) The final plat was approved after April 13, 1961, or the preliminary plat was approved after April 30, 1969, or

(b) Sales of lots to purchasers with reference to the plat, or substantial development incident to platting or required by the plat, occurred prior to April 1, 1971, and

(c) The development to be made without a permit meets all requirements of the applicable state agency or local government, other than requirements imposed pursuant to this chapter, and

(d) The development does not involve construction of buildings, or involves construction on wetlands of buildings to serve only as community social or recreational facilities for the use of owners of platted lots and the buildings do not exceed a height of thirty-five feet above average grade level, and

(e) The development is completed within two years after the effective date of this chapter.

(10) The applicable state agency or local government is authorized to approve a final plat with respect to shorelines of the state included within a preliminary plat approved after April 30, 1969, and prior to April 1, 1971: *Provided*, That any substantial development within the platted shorelines of the state is authorized by a permit granted pursuant to this section, or does not require a permit as provided in subsection (9) of this section, or does not require a permit because of substantial development occurred prior to June 1, 1971.

(11) Any permit for a variance or a conditional use by local government under approved master programs must be submitted to the department for its approval or disapproval. [1973 2nd ex.s. c 19 § 1; 1971 ex.s. c 286 § 14.]

90.58.150 Selective commercial timber cutting, when. With respect to timber situated within two hundred feet abutting landward of the ordinary high water mark within shorelines of state-wide significance, the department or local government shall allow only selective commercial timber cutting, so that no more than thirty percent of the merchantable trees may be harvested in any ten year period of time: *Provided*, That other timber harvesting methods may be permitted in those limited instances where the topography, soil conditions or silviculture practices necessary for regeneration render selective logging ecologically detrimental: *Provided further*, That clear cutting of timber which is solely incidental to the preparation of land for other uses authorized by this chapter may be permitted. [1971 ex.s. c 286 § 15.]

90.58.160 Prohibition against surface drilling for oil or gas, where. Surface drilling for oil or gas is prohibited in the waters of Puget Sound north to the Canadian boundary and the Strait of Juan de Fuca seaward from the ordinary high water mark and on all lands within one thousand feet landward from said mark. [1971 ex.s. c 286 § 16.]

90.58.170 Shorelines hearings board——Established——Members——Chairman——Quorum for decision——Administrative and clerical assistance——Expenses of members. A shorelines hearings board sitting as a quasi judicial body is hereby established which shall be made up of six members: Three members shall be members of the pollution control hearings board; two members, one appointed by the association of Washington cities and one appointed by the association of county commissioners, both to serve at the pleasure of the associations; and the state land commissioner or his designee. The chairman of the pollution control hearings board shall be the chairman of the shorelines hearings board. A decision must be agreed to by at least four members of the board to be final. The pollution control hearings board shall provide the shorelines appeals board such administrative and clerical assistance as the latter may require. The members of the shorelines appeals board shall receive the compensation, travel, and subsistence expenses as provided in RCW 43.03.050 and 43.03.060. [1971 ex.s. c 286 § 17.]

90.58.175 Rules and regulations. The shorelines hearings board may adopt rules and regulations governing the administrative practice and procedure in and before the board. [1973 1st ex.s. c 203 § 3.]

90.58.180 Appeals from granting, denying or rescinding permits, procedure——Board to act, when——Local government appeals to board——Grounds for declaring master program invalid——Appeals to court, procedure. (1) Any person aggrieved by the granting or denying of a permit on shorelines of the state, or rescinding a permit pursuant to RCW 90.58.150 may seek review from the shorelines hearings board by filing a request for the same within thirty days of receipt of the final order. Concurrently with the filing of any request for review with the board as provided in this section pertaining to a final order of a local government, the requestor shall file a copy of his request with the department and the attorney general. If it appears to the department or the attorney general that the requestor has valid reasons to seek review, either the department or the attorney general may certify the request within thirty days after its receipt to the shorelines hearings board following which the board shall then, but not otherwise, review the matter covered by the requestor: *Provided*, That the failure to obtain such certification shall not preclude the requestor from obtaining a review in the superior court under any right to review otherwise available to the requestor. The department and the attorney general may intervene to protect the public interest and insure that the provisions of this chapter are complied with at any time within forty-five days from the date of the filing of said copies by the requestor.

(2) The department or the attorney general may obtain review of any final order granting a permit, or granting or denying an application for a permit issued by a local government by filing a written request with the shorelines appeals board and the appropriate local government within forty-five days from the date the final order was filed as provided in subsection (5) of RCW 90.58.140.

(3) The review proceedings authorized in subsections (1) and (2) of this section are subject to the provisions of chapter 34.04 RCW pertaining to procedures in contested cases. Judicial review of such proceedings of the shorelines hearings board may be had as provided in chapter 34.04 RCW.

(4) Local government may appeal to the shorelines earings board any rules, regulations, guidelines, designations, or master programs for shorelines of the state lopted or approved by the department within thirty ys of the date of the adoption or approval. The board all make a final decision within sixty days following e hearing held thereon.

(a) In an appeal relating to a master program for orelines, the board, after full consideration of the potions of the local government and the department, all determine the validity of the master program. If e board determines that said program:

(i) is clearly erroneous in light of the policy of this apter; or

(ii) constitutes an implementation of this chapter in olation of constitutional or statutory provisions; or

(iii) is arbitrary and capricious; or

(iv) was developed without fully considering and valuating all proposed master programs submitted to ie department by the local government; or

(v) was not adopted in accordance with required procedures;

ie board shall enter a final decision declaring the proam invalid, remanding the master program to the dertment with a statement of the reasons in support of ie determination, and directing the department to lopt, after a thorough consultation with the affected cal government, a new master program. Unless the ard makes one or more of the determinations as reinbefore provided, the board shall find the master ogram to be valid and enter a final decision to that ject.

(b) In an appeal relating to a master program for orelines of state-wide significance the board shall approve the master program adopted by the department less a local government shall, by clear and convincg evidence and argument, persuade the board that the aster program approved by the department is inconstent with the policy of RCW 90.58.020 and the applible guidelines.

(c) In an appeal relating to rules, regulations, guidees, master programs of state-wide significance, and signations, the standard of review provided in RCW .04.070 shall apply.

(5) Rules, regulations, designations, master programs, d guidelines shall be subject to review in superior urt, if authorized pursuant to RCW 34.04.070: *Proded*, That no review shall be granted by a superior urt on petition from a local government unless the cal government shall first have obtained review under bsection (4) of this section and the petition for court view is filed within three months after the date of final cision by the shorelines hearings board. [1973 1st ex.s. 203 § 2; 1971 ex.s. c 286 § 18.]

90.58.190 Review and adjustments to master programs. The department and each local government shall riodically review any master programs under its jusdiction and make such adjustments thereto as are cessary. Each local government shall submit any proosed adjustments, to the department as soon as they are completed. No such adjustment shall become effective until it has been approved by the department. [1971 ex.s. c 286 § 19.]

90.58.200 Rules and regulations. The department and local governments are authorized to adopt such rules as are necessary and appropriate to carry out the provisions of this chapter. [1971 ex.s. c 286 § 20.]

90.58.210 Court actions to insure against conflicting uses and to enforce. The attorney general or the attorney for the local government shall bring such injunctive, declaratory, or other actions as are necessary to insure that no uses are made of the shorelines of the state in conflict with the provisions and programs of this chapter, and to otherwise enforce the provisions of this chapter. [1971 ex.s. c 286 § 21.]

90.58.220 General penalty. In addition to incurring civil liability under RCW 90.58.210, any person found to have wilfully engaged in activities on the shorelines of the state in violation of the provisions of this chapter or any of the master programs, rules, or regulations adopted pursuant thereto shall be guilty of a gross misdemeanor, and shall be punished by a fine of not less than twenty-five nor more than one thousand dollars or by imprisonment in the county jail for not more than ninety days, or by both such fine and imprisonment: *Provided*, That the fine for the third and all subsequent violations in any five-year period shall be not less than five hundred nor more than ten thousand dollars. [1971 ex.s. c 286 § 22.]

90.58.230 Violators liable for damages resulting from violation——Attorney's fees and costs. Any person subject to the regulatory program of this chapter who violates any provision of this chapter or permit issued pursuant thereto shall be liable for all damage to public or private property arising from such violation, including the cost of restoring the affected area to its condition prior to violation. The attorney general or local government attorney shall bring suit for damages under this section on behalf of the state or local governments. Private persons shall have the right to bring suit for damages under this section on their own behalf and on the behalf of all persons similarly situated. If liability has been established for the cost of restoring an area affected by a violation the court shall make provision to assure that restoration will be accomplished within a reasonable time at the expense of the violator. In addition to such relief, including money damages, the court in its discretion may award attorney's fees and costs of the suit to the prevailing party. [1971 ex.s. c 286 § 23.]

90.58.240 Additional authority granted department and local governments. In addition to any other powers granted hereunder, the department and local governments may:

(1) Acquire lands and easements within shorelines of the state by purchase, lease, or gift, either alone or in

concert with other governmental entities, when necessary to achieve implementation of master programs adopted hereunder;

(2) Accept grants, contributions, and appropriations from any agency, public or private, or individual for the purposes of this chapter;

(3) Appoint advisory committees to assist in carrying out the purposes of this chapter;

(4) Contract for professional or technical services required by it which cannot be performed by its employees. [1972 ex.s. c 53 § 1; 1971 ex.s. c 286 § 24.]

90.58.250 Department to cooperate with local governments——Grants for development of master programs. The department is directed to cooperate fully with local governments in discharging their responsibilities under this chapter. Funds shall be available for distribution to local governments on the basis of applications for preparation of master programs. Such applications shall be submitted in accordance with regulations developed by the department. The department is authorized to make and administer grants within appropriations authorized by the legislature to any local government within the state for the purpose of developing a master shorelines program.

No grant shall be made in an amount in excess of the recipient's contribution to the estimated cost of such program. [1971 ex.s. c 286 § 25.]

90.58.260 State to represent its interest before federal agencies, interstate agencies and courts. The state, through the department of ecology and the attorney general, shall represent its interest before water resource regulation management, development, and use agencies of the Unites States, including among others, the federal power commission, environmental protection agency, corps of engineers, department of the interior, department of agriculture and the atomic energy commission, before interstate agencies and the courts with regard to activities or uses of shorelines of the state and the program of this chapter. Where federal or interstate agency plans, activities, or procedures conflict with state policies, all reasonable steps available shall be taken by the state to preserve the integrity of its policies. [1971 ex.s. c 286 § 26.]

90.58.270 Nonapplication to certain structures, docks, developments, etc., placed in navigable waters——Nonapplication to certain rights of action, authority. (1) Nothing in this statute shall constitute authority for requiring or ordering the removal of any structures, improvements, docks, fills, or developments placed in navigable waters prior to December 4, 1969, and the consent and authorization of the state of Washington to the impairment of public rights of navigation, and corollary rights incidental thereto, caused by the retention and maintenance of said structures, improvements, docks, fills or developments are hereby granted: *Provided*, That the consent herein given shall not relate to any structures, improvements, docks, fills, or developments placed on tidelands, shorelands, or beds underlying said waters which are in trespass or in violation of state statutes.

(2) Nothing in this section shall be construed as altering or abridging any private right of action, other than a private right which is based upon the impairment of public rights consented to in subsection (1) hereof.

(3) Nothing in this section shall be construed as altering or abridging the authority of the state or local governments to suppress or abate nuisances or to abate pollution.

(4) Subsection (1) of this section shall apply to any case pending in the courts of this state on June 1, 1971 relating to the removal of structures, improvements, docks, fills, or developments based on the impairment of public navigational rights. [1971 ex.s. c 286 § 27.]

90.58.280 Application to all state agencies, counties, public and municipal corporations. The provisions of this chapter shall be applicable to all agencies of state government, counties, and public and municipal corporations and to all shorelines of the state owned or administered by them. [1971 ex.s. c 286 § 28.]

90.58.290 Restrictions as affecting fair market value of property. The restrictions imposed by this chapter shall be considered by the county assessor in establishing the fair market value of the property. [1971 ex.s. c 286 § 29.]

90.58.300 Department as regulating state agency——Special authority. The department of ecology is designated the state agency responsible for the program of regulation of the shorelines of the state, including coastal shorelines and the shorelines of the inner tidal waters of the state, and is authorized to cooperate with the federal government and sister states and to receive benefits of any statutes of the United States whenever enacted which relate to the programs of this chapter. [1971 ex.s. c 286 § 30.]

90.58.310 Designation of shorelines of state-wide significance by legislature——Recommendation by director, procedure. Additional shorelines of the state shall be designated shorelines of state-wide significance only by affirmative action of the legislature.

The director of the department may, however, from time to time, recommend to the legislature areas of the shorelines of the state which have state-wide significance relating to special economic, ecological, educational, developmental, recreational, or aesthetic values to be designated as shorelines of state-wide significance.

Prior to making any such recommendation the director shall hold a public hearing in the county or counties where the shoreline under consideration is located. It shall be the duty of the county commissioners of each county where such a hearing is conducted to submit their views with regard to a proposed designation to the director at such date as the director determines but in

ent shall the date be later than sixty days after the hearing in the county. [1971 ex.s. c 286 § 31.]

58.320 **Height limitation respecting permits.** No it shall be issued pursuant to this chapter for any or expanded building or structure of more than -five feet above average grade level on shorelines state that will obstruct the view of a substantial er of residences on areas adjoining such shorelines where a master program does not prohibit the and then only when overriding considerations of ublic interest will be served. [1971 ex.s. c 286 § 32.]

58.330 **Study of shorelines of cities and towns cted to legislature——Scope.** The department of gy, the attorney general, and the harbor line com- on are directed as a matter of high priority to un- ke jointly a study of the locations, uses and ties, both proposed and existing, relating to the lines of the cities, and towns of the state and sub- report which shall include but not be limited to llowing:

Events leading to the establishment of the various r lines pertaining to cities of the state;

The location of all such harbor lines;

The authority for establishment and criteria used ation of the same;

Present activities and uses made within harbors heir relationship to harbor lines;

Legal aspects pertaining to any uncertainty and sistency; and

The relationship of federal, state and local gov- nts to regulation of uses and activities pertaining area of study.

report shall be submitted to the legislature not han December 1, 1972. [1971 ex.s. c 286 § 33.]

58.340 **Use policies for land adjacent to shorelines, opment of.** All state agencies, counties, and public municipal corporations shall review administrative anagement policies, regulations, plans, and ordi- s relative to lands under their respective jurisdic- adjacent to the shorelines of the state so as the [to] e a use policy on said land consistent with the of this chapter, the guidelines, and the master ms for the shorelines of the state. The depart- may develop recommendations for land use con- or such lands. Local governments shall, in ping use regulations for such areas, take into leration any recommendations developed by the tment as well as any other state agencies or units al government. [1971 ex.s. c 286 § 34.]

58.350 **Nonapplication to treaty rights.** Nothing in apter shall affect any rights established by treaty ch the United States is a party. [1971 ex.s. c 286 §

0——p 60]

90.58.360 **Existing requirements for permits, certificates, etc., not obviated.** Nothing in this chapter shall obviate any requirement to obtain any permit, certificate, license, or approval from any state agency or local government. [1971 ex.s. c 286 § 36.]

90.58.900 **Liberal construction——1971 ex.s. c 286.** This chapter is exempted from the rule of strict construction, and it shall be liberally construed to give full effect to the objectives and purposes for which it was enacted. [1971 ex.s. c 286 § 37.]

90.58.910 **Severability——1971 ex.s. c 286.** If any provision of this chapter, or its application to any person or legal entity or circumstances, is held invalid, the remainder of the act, or the application of the provision to other persons or legal entities or circumstances, shall not be affected. [1971 ex.s. c 286 § 40.]

90.58.920 **Effective date——1971 ex.s. c 286.** This chapter is necessary for the immediate preservation of the public peace, health and safety, the support of the state government, and its existing institutions. This 1971 act shall take effect on June 1, 1971. The director of ecology is authorized to immediately take such steps as are necessary to insure that this 1971 act is implemented on its effective date. [1971 ex.s. c 286 § 41.]

90.58.930 **Referendum to the people——1971 ex.s. c 286——Determining if act continues in force and effect.** This 1971 act constitutes an alternative to Initiative 43. The secretary of state is directed to place this 1971 act on the ballot in conjunction with Initiative 43 at the next ensuing regular election.

This 1971 act shall continue in force and effect until the secretary of state certifies the election results on this 1971 act. If affirmatively approved at the ensuing regular general election, the act shall continue in effect thereafter. [1971 ex.s. c 286 § 42.]

Reviser's note: Chapter 90.58 RCW [1971 ex.s. c 286] was approved and validated at the 1972 general election as Alternative Measure 43B.

Chapter 90.62
ENVIRONMENTAL COORDINATION PROCEDURES ACT

Sections

90.62.010 Legislative finding——Purposes.
90.62.020 Definitions.
90.62.030 Thermal power plants exempt from chapter.
90.62.040 Master application for proposed project——Contents——Requirements——Notice to state agencies——Forms.
90.62.050 Notice of proposed project——Publication——Contents——Public hearing.
90.62.060 Public hearing——Procedure——Final decisions.
90.62.070 Withdrawal of agency from participation.
90.62.080 Departmental review——Judicial review.
90.62.090 Application, scope, construction of chapter——Continuation of fee schedules.
90.62.100 Compliance with local zoning ordinances and plans——Certification——Other laws not affected.
90.62.110 Rules——Authority——Cooperation enjoined.
90.62.120 Permit requirements information centers——Offices for environmental permit applications——Procedures.

APPENDIX NO. 7

Michigan Natural River Act of 1970, MCLA 281.761 to 281.776 (1976 Pocket Part)

NATURAL RIVER ACT OF 1970
Caption editorially supplied

Cross References

Riverfront as open space land, preservation, see § 554.702.

Law Review Commentaries

Aesthetics as a legal basis for environmental control. Leighton L. Leighty, 17 Wayne L.Rev. 1347 (1971).

Due process of law. John E. Glavin, 19 Wayne L.Rev. 402 (1973).

Filling and dredging in Michigan. Richard W. Bartke, 18 Wayne L.Rev. 1515 (1972).

Land use aesthetics and the state legislature. 19 Wayne L.Rev. 73 (1972).

P.A.1970, No. 231, Eff. April 1, 1971.

AN ACT to authorize the establishment of a system of designated wild, scenic and recreational rivers; to prescribe the powers and duties of the natural resources commission with respect thereto; to fund necessary study and comprehensive planning for the establishment of the system; to provide for planning, zoning and cooperation with local units of government; to authorize the protection of designated river frontage by acquisition, lease, easement or other means; to authorize local units of government and the commission to establish zoning districts in which certain uses of rivers and related lands may be encouraged, regulated or prohibited; to provide for limitations on uses of land and their natural resources, and on the platting of land; and to provide that assessing officers shall take cognizance of the effect of zoning on true cash value.

The People of the State of Michigan enact:

281.761 Short title

Sec. 1. *This act shall be known and may be cited as the "natural river act of 1970".*

P.A.1970, No. 231, § 1, Eff. April 1, 1971.

Law Review Commentaries

Dredging, filling and flood plain regulation. Richard W. Bartke. 17 Wayne L. Rev. 861 (1971).

281.762 Definitions

Sec. 2. *As used in this act:*

(a) "Commission" means the natural resources commission.

(b) "River" means a flowing body of water or a portion or tributary thereof, including streams, creeks or impoundments and small lakes thereon.

(c) "Free flowing" means existing or flowing in natural condition without impoundment, diversion, straightening, riprapping or other modification.

(d) "Person" means an individual, partnership, firm, corporation, association or other entity.

(e) "System" means all of those rivers or portions thereof designated under this act.

(f) "Natural river" means a river which has been designated by the commission for inclusion in the wild, scenic and recreational rivers system.

P.A.1970, No. 231, § 2, Eff. April 1, 1971.

281.763 Natural river area, designation, purposes, boundaries, planning, state land, federal programs

Sec. 3. The commission, in the interest of the people of the state and future generations, may designate a river or portion thereof, as a natural river area for the purpose of preserving and enhancing its values for water conservation, its free flowing condition and its fish, wildlife, boating, scenic, aesthetic, flood plain, ecologic, historic and recreational values and uses. The area shall include adjoining or related lands as appropriate to the purposes of the designation. The commission shall prepare and adopt a long range comprehensive plan for a designated natural river area which shall set forth the purposes of the designation, proposed

uses of lands and waters, and management measures designed to accomplish the purposes. State land within the designated area shall be administered and managed in accordance with the plan, and state management of fisheries, streams, waters, wildlife and boating shall take cognizance of the plan. The commission shall publicize and inform private and public landowners or agencies as to the plan and its purposes, so as to encourage their cooperation in the management and use of their land in a manner consistent with the plan, and the purposes of the designation. The commission shall cooperate with federal agencies administering any federal program concerning natural river areas, and with any watershed council established under Act No. 253 of the Public Acts of 1964, being sections 323.301 to 323.320 of the Compiled Laws of 1948, when such cooperation will further the interest of the state.

P.A.1970, No. 231, § 3, Eff. April 1, 1971.

Law Review Commentaries

Dredging, filling and flood plain regulation. Richard W. Bartke, 17 Wayne L. Rev. 861 (1971).

281.764 Pre-requisites for designation; categories of natural rivers, definition, establishment

Sec. 4. A river qualifying for designation as a natural river area shall possess 1 or more of the natural or outstanding existing values cited in section 3[1] and shall be permanently managed for the preservation or enhancement of such values. Categories of natural rivers shall be defined and established by the commission, based on the characteristics of the waters and the adjoining lands and their uses, both as existing and as proposed, including such categories as wild, scenic and recreational. The categories shall be specified in the designation and the long range comprehensive plan.

P.A.1970, No. 231, § 4, Eff. April 1, 1971.

[1] Section 281.763.

Law Review Commentaries

Dredging, filling and flood plain regulation. Richard W. Bartke, 17 Wayne L. Rev. 861 (1971).

281.765 Acquisition of lands or interests in lands

Sec. 5. The commission may acquire lands or interests in lands adjacent to a designated natural river for the purpose of maintaining or improving the river and its environment in conformance with the purposes of the designation and the plan. Interests which may be acquired include, but are not limited to, easements designed to provide for preservation and to limit development, without providing public access and use. Lands or interests in lands shall be acquired under this act only with consent of the owner.

P.A.1970, No. 231, § 5, Eff. April 1, 1971.

281.766 Federal programs, administration; leases or agreements to administer; preservation and enhancement of area; facilities, construction, maintenance

Sec. 6. (1) The commission may administer federal financial assistance programs for natural river areas.

(2) The commission may enter into a lease or agreement with any person or political subdivision to administer all or part of their lands in a natural river area.

(3) The commission may expend funds for works designed to preserve and enhance the values and uses of a natural river area and for construction, management, maintenance and administration of facilities in a natural river area conforming to the purposes of the designation, when the funds are so appropriated by the legislature.

P.A.1970, No. 231, § 6, Eff. April 1, 1971.

281.767 Hearings prior to designation, place, notice

Sec. 7. Before designating a river as a natural river area, the commission shall conduct public hearings in the county seat of any county in which a portion of the designated natural river area is located. Notices of the hearings shall be advertised at least twice, not less than 30 days before the hearing, in a newspaper having general circulation in each such county and in at least 1 newspaper having general circulation in the state and 1 newspaper published in the Upper Peninsula.
P.A.1970, No. 231, § 7, Eff. April 1, 1971.

281.768 Zoning; ordinances, rules

Sec. 8. After designation of a river or portion of a river as a natural river area and following the preparation of the long range comprehensive plan, the commission may determine that the uses of land along the river except within the limits of an incorporated municipality, shall be controlled by zoning contributing to accomplishment of the purposes of this act and the natural river plan. County and township governments are encouraged to establish these zoning controls and such additional controls as may be appropriate, including but not limited to building and subdivision controls. The commission may provide advisory, planning and cooperative assistance in the drafting of ordinances to establish such controls. If the local unit does not, within 1 year after notice from the commission, have in full force and effect a zoning ordinance or interim zoning ordinance established under authority of the acts cited in section 11,[1] the commission, on its own motion, may promulgate a zoning rule in accordance with section 13.[2] A zoning rule may also be promulgated if the commission finds that an adopted or existing zoning ordinance fails to meet adequately guidelines consistent with this act as provided by the commission and transmitted to the local units concerned, does not take full cognizance of the purposes and objectives of this act or is not in accord with the purposes of designation of the river as established by the commission.
P.A.1970, No. 231, § 8, Eff. April 1, 1971.

[1] Section 281.771.
[2] Section 281.773.

Law Review Commentaries

Dredging, filling and flood plain regulation. Richard W. Bartke, 17 Wayne L. Rev. 881 (1971).

281.769 Purposes of ordinances or rules

Sec. 9. A zoning ordinance adopted by a local unit of government or a zoning rule promulgated by the commission shall provide for the protection of the river and its related land resources consistent with the preservation and enhancement of their values and the objectives set forth in section 3.[1] The ordinance or rule shall protect the interest of the people of the state as a whole. It shall take cognizance of the characteristics of the land and water concerned, surrounding development and existing uses and provide for conservation of soil, water, stream bed and banks, flood plains and adjoining uplands.
P.A.1970, No. 231, § 9, Eff. April 1, 1971.

[1] Section 281.763.

281.770 Zoning districts; structures; subdivisions; roads; public utility lines; vegetation, cutting; mining; drilling for gas and oil

Sec. 10. The ordinance or rule shall establish zoning districts within which such uses of land as for agriculture, forestry, recreation, residence, industry, commerce and additional uses may be encouraged, regulated or prohibited. It may limit or prohibit the placement of structures of any class or designate their location with relation to the water's edge, to property or subdivision lines and to flood flows and may limit the subdivision of lands for platting purposes. It may control the location and design of highways and roads and of public utility transmission and distribution lines except on lands or other interests in real property owned by the utility on January 1, 1971. It may prohibit or limit the cutting of trees or other

vegetation but such limits shall not apply for a distance of more than 100 feet from the river's edge. It may specifically prohibit or limit mining and drilling for oil and gas but such limits shall not apply for a distance of more than 300 feet from the river's edge. It may contain other provisions necessary to accomplish the objectives of this act. A zoning rule promulgated by the commission shall not control lands more than 400 feet from the river's edge.
P.A.1970, No. 231, § 10, Eff. April 1, 1971.

281.771 County and township zoning

Sec. 11. A local unit of government in establishing a zoning ordinance, in addition to the authority and requirements of this act, shall conform to Act No. 184 of the Public Acts of 1943, as amended, being sections 125.271 to 125.301 of the Compiled Laws of 1948, or Act No. 183 of the Public Acts of 1943, as amended, being sections 125.201 to 125.232 of the Compiled Laws of 1948. Any conflict shall be resolved in favor of the provisions of this act. The powers herein granted shall be liberally construed in favor of the local unit or the commission exercising them, in such manner as to promote the orderly preservation or enhancement of the values of the rivers and related land resources and their use in accordance with a long range comprehensive general plan to insure the greatest benefit to the state as a whole.
P.A.1970, No. 231, § 11, Eff. April 1, 1971.

281.772 Maps of zoning districts, filing; property within districts, true cash value for assessments

Sec. 12. Upon adoption of a zoning ordinance or rule, certified copies of the maps showing districts shall be filed with the local tax assessing officer and the state tax commission. In establishing true cash value of property within the districts zoned, the assessing officer shall take cognizance of the effect of limits on use established by the ordinance or rule.
P.A.1970, No. 231, § 12, Eff. April 1, 1971.

Law Review Commentaries

Dredging, filling and flood plain regulation. Richard W. Bartke. 17 Wayne L. Rev. 861 (1971).

281.773 Administrative procedures and rules; personnel; violations; zoning rules, promulgation, procedure, review, nonconforming uses

Sec. 13. (1) The commission shall prescribe such administrative procedures and rules and provide such personnel as it may deem necessary for the enforcement of a zoning ordinance or rule enacted in accordance herewith. A circuit court, upon petition and a showing by the commission that there exists a violation of a rule properly promulgated under this act, shall issue any necessary order to the defendant to correct the violation or to restrain the defendant from further violation of the rule.

(2) A zoning rule of the commission shall be promulgated in accordance with and subject to the provisions of Act No. 306 of the Public Acts of 1969, as amended, being sections 24.201 to 24.315 of the Compiled Laws of 1948. The rule shall include procedures for receiving and acting upon applications from local units of government or landowners for change of boundaries or change in permitted uses in accordance with sections 71 to 87 of Act No. 306 of the Public Acts of 1969.[1] An aggrieved party may seek judicial review in accordance with and subject to the provisions of sections 101 to 106 of Act No. 306 of the Public Acts of 1969.

(3) The lawful use of any building or structure and of any land or premise as existing and lawful at the time of enactment of a zoning ordinance or rule or of an amendment thereof may be continued although such use does not conform with the provisions of the ordinance, rule or amendment. The ordinance or rule shall

provide for the completion, restoration, reconstruction, extension or substitution of nonconforming uses upon such reasonable terms as may be set forth in the zoning ordinance or rule.
P.A.1970, No. 231, § 13, Eff. April 1, 1971.

[1] Sections 24.271 to 24.287.

Michigan Administrative Code

For Rules and Regulations, see Rule 281.51 et seq., Michigan Administrative Code.

281.774 Federal wild and scenic river systems, inclusion of natural river areas, cooperative agreements

Sec. 14. Nothing in this act shall preclude a component of the system from becoming a part of the national wild and scenic river system under the federal wild and scenic rivers act, Public Law 90-542,[1] approved October 2, 1968. The commission may enter into written cooperative agreements for joint federal-state administration of rivers which may be designated under Public Law 90-542.
P.A.1970, No. 231, § 14, Eff. April 1, 1971.

[1] 16 U.S.C.A. § 1271 et seq.

281.775 Plans, approval; erosion or flow alteration, control; rules

Sec 15. The commission shall approve preliminary and final plans for site or route location, construction or enlargement of utility transmission lines, publicly provided recreation facilities, access sites, highways, roads, bridges or other structures and for publicly developed water management projects, within a designated natural river area, except within the limits of a city or incorporated village. It may require any measure necessary to control damaging erosion or flow alteration during or in consequence of construction. Rules concerning such approvals and requirements shall be promulgated under the provisions of Act No. 306 of the Public Acts of 1969, as amended.[1]
P.A.1970, No. 231, § 15, Eff. April 1, 1971.

[1] Section 24.201 et seq.

281.776 Use of natural resources

Sec. 16. This act may not be construed to prohibit a reasonable and lawful use of any other natural resource which will benefit the general welfare of the people of this state and which is not inconsistent with the purpose of this act.
P.A.1970, No. 231, § 16, Eff. April 1, 1971.

Law Review Commentaries

Dredging, filling and flood plain regulation. Richard W. Bartke, 17 Wayne L. Rev. 861 (1971).

VESSELS FOR HIRE

281.801 Definitions

Law Review Commentaries

Dredging, filling and flood plain regulation. Richard W. Bartke, 17 Wayne L. Rev. 861 (1971).

281.803 Minimum safety standards

Michigan Administrative Code

For Rules and Regulations, see Rule 281.2001 et seq., Michigan Administrative Code.

281.811 Penalty

Law Review Commentaries

Proposed revised criminal code eliminating ambiguity in current statutes' approach to mens rea. 14 Wayne L.Rev. 791, 792 (1968).

APPENDIX NO. 8

(NOTE: We have not been able to procure a copy of the Oregon Scenic Waterways Act. However, the important provisions of the Act are all quoted or described by the Oregon Court of Appeals in Scott v. State of Oregon, 541 P.2d 516 (Or. App. 1975), the full text of which is reproduced below.)

Helen R. SCOTT, Appellant,

v.

STATE of Oregon, By and Through Its STATE HIGHWAY COMMISSION, Respondent.

Court of Appeals of Oregon.

Argued and Submitted July 28, 1975.

Decided Oct. 20, 1975.

Owner of related adjacent land along a designated section of Rogue river brought an inverse condemnation action, claiming that State had taken an interest in her land as a result of the adoption of the Scenic Waterways Act and that she should be compensated therefor. The Circuit Court, Josephine County, Samuel M. Bowe, J., held that there had been no taking and dismissed the complaint, and plaintiff appealed. The Court of Appeals, Fort, J., held that the Scenic Waterways Act does not give the State a "scenic easement" in all related adjacent land, that regulatory provisions of the Act are reasonable in light of its objective, and that regulatory powers given State under the Act do not constitute a taking of the land regulated.

Affirmed.

1. Constitutional Law ⇐48(1)

A statute should be construed so as to hold it constitutional if possible.

2. Easements ⇐1

An "easement" is an interest in land.

3. Eminent Domain ⇐85

State may be required to pay for easements it has taken or extinguished. ORS 390.805–390.925, 390.815; Const. art. 1, § 18.

4. States ⇐85

The Scenic Waterways Act does not give the State a "scenic easement" in all related adjacent land. ORS 390.805–390.925, 390.805(3), 390.815, 390.825, 390.845, 390.845(3, 5, 6).

5. States ⇐85

Regulatory provisions of the Scenic Waterways Act are separate from provisions giving State the right to acquire land or interests in related adjacent land, and thus State did not acquire an easement in related adjacent land along a designated section of Rogue river merely by the adoption of the Act. ORS 390.805–390.925, 390.805(3), 390.815, 390.825, 390.845, 390.845 (3, 5, 6).

6. Eminent Domain ⇐2(10)

Regulatory provisions of the Scenic Waterways Act may be exercised without utilizing power of eminent domain. ORS 390.805–390.925, 390.815; Const. art. 1, § 18.

7. Health and Environment ⇐25.5

Scenic Waterways Act is aimed at preventing the uses of land along free flow-

ing rivers in ways that destroy the character of those rivers. ORS 390.805(3), 390.825, 390.845, 390.845(3, 5, 6).

8. Health and Environment ⇐25.5

Sections of Scenic Waterways Act and regulations under it describing application procedure contemplate that the Department of Transportation will act promptly in passing on an application. ORS 390.845(2, 4, 5).

9. Zoning ⇐68

Power to limit use of land through zoning regulation is within police power of the State.

10. Health and Environment ⇐21

Regulatory provisions of the Scenic Waterways Act are reasonable in light of its objective. ORS 390.805(3), 390.815, 390.825, 390.845, 390.845(3, 5, 6).

11. Eminent Domain ⇐2(10)

Regulatory powers given State under Scenic Waterways Act do not constitute a taking of the land regulated. ORS 390.805–390.925, 390.805(3), 390.815, 390.825, 390.845, 390.845(3, 5, 6); Const. art. 1, § 18.

12. Health and Environment ⇐21

One-year waiting period provided for in Scenic Waterways Act is not designed to freeze or depress land values before condemnation and is a reasonable enactment for the public safety, health, morals, or general welfare. ORS 390.805(3), 390.825, 390.845, 390.845(3, 5, 6).

Donald H. Coulter, Grants Pass, argued the cause for appellant. With him on the briefs were Myrick, Coulter, Seagraves & Neely, Grants Pass.

Janet A. Metcalf, Asst. Atty. Gen., Salem, argued the cause for respondent. With her on the brief were Lee Johnson, Atty. Gen., and W. Michael Gillette, Sol. Gen., Salem.

Martin, Bischoff, Templeton & Biggs and David P. Templeton, Portland, filed a brief amicus curiae for Don S. Willner.

Before SCHWAB, C. J., and FORT and THORNTON, JJ.

FORT, Judge.

Plaintiff brought an inverse condemnation action claiming that the state of Oregon had taken an interest in her land as a result of the adoption of the Scenic Waterways Act, ORS 390.805–390.925, and that she should be compensated therefor in the amount of $25,000. Oregon Constitution, Art. 1, § 18.[1] The trial court held there had been no taking and dismissed plaintiff's complaint. She appeals.

The Scenic Waterways Act was adopted by initiative at the general election held November 3, 1970, and went into effect December 3, 1970. The policy behind the Act is stated in ORS 390.815:

"The people of Oregon find that many of the free-flowing rivers of Oregon and lands adjacent to such rivers possess outstanding scenic, fish, wildlife, geological, botanical, historic, archeologic, and outdoor recreation values of present and future benefit to the public. The people of Oregon also find that the policy of permitting construction of dams and other impoundment facilities at appropriate sections of the rivers of Oregon needs to be complemented by a policy that would preserve other selected rivers or sections thereof in a free-flowing condition and would protect and preserve the natural setting and water quality of such rivers and fulfill other conservation purposes. It is therefore the policy of Oregon to preserve for the benefit of the public selected parts of the state's free-flowing rivers. For these purposes there is established an Oregon Scenic

1 Oregon Constitution, Art. I, § 18:

"Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation; nor except in the case of the state, without such compensation first assessed and tendered; provided, that the use of all roads, ways and waterways necessary to promote the transportation of the raw products of mine or farm or forest or water for beneficial use or drainage is necessary to the development and welfare of the state and declared a public use."

Waterways System to be composed of areas designated in accordance with ORS 390.805 to 390.925 and any subsequent Acts."

ORS 390.825 designates six rivers or portions of rivers as scenic waterways. The term "scenic waterway" includes "related adjacent land," which is defined as

"* * * all land within one-fourth of one mile of the bank on each side of a river or segment of river within a scenic waterway, except land that, in the department's judgment, does not affect the view from the waters within a scenic waterway." ORS 390.805(3).

ORS 390.845 authorizes the Department of Transportation (department), formerly the State Highway Commission, to regulate the use of related adjacent land. The procedure is as follows: an owner who wishes to use his land in a new way must submit a detailed written proposal to the department (ORS 390.845(3)); if the department disapproves the proposed use because it impairs the natural beauty of the scenic waterway, it must negotiate with the owner if he so requests in an effort to agree on an acceptable plan (ORS 390.845(5)); after three months, either party may terminate negotiations (ORS 390.845(5)); after nine months following notice of termination of the negotiations, the owner may proceed to develop his land as he therein proposed (ORS 390.845(5)); and by ORS 390.845(6) the department, with the concurrence of the State Water Resources Board, is also given authority to institute condemnation proceedings after the expiration of nine months following receipt of the landowner's written proposal.

Plaintiff owns "related adjacent land" along a designated section of the Rogue River. She purchased this land "as an investment for rural recreational building" in March 1969. In November 1972, pursuant to ORS 390.845(3), plaintiff applied to the department for permission to build a house on each of the two lots into which her approximately eight acres were divided, each house to be 30 feet in height and painted glossy white. After several discussions and much correspondence with plaintiff, an on-site visit and a survey by department staff members, the department by letter dated April 18, 1973, denied permission to construct the houses. In that letter, however, it did grant permission if several requirements were met, including the requirement that plaintiff start to build within one year of the letter and complete exterior construction within six months thereafter.

However, plaintiff did not build on the lots, but instead filed this action alleging that the state of Oregon had taken her land and demanding compensation. Specifically, plaintiff alleged that the state had acquired a scenic easement in her property and also that under the Act the department was restricting the manner in which plaintiff could use her land to such an extent that plaintiff was substantially deprived by the state of the useful possession of her property for the benefit of the general public.

The parties stipulated for a bifurcated trial, first disposing of the issue of whether her property had been taken. The question of its value would be tried later if she prevailed. The trial court held that there was no taking and thus dismissed plaintiff's complaint.

ORS 390.805(4) defines "scenic easement" as

"* * * the right to control the use of related adjacent land, including air space above such land, for the purpose of protecting the scenic view from waters within a scenic waterway * * *."

Plaintiff claims the term "scenic easement" describes the right to regulate use of related adjacent land that the state acquires automatically under the Act. Defendant contends that an easement is not involved in the state's right to regulate use of related adjacent land, but that an easement is an additional right which the Act authorizes the state to acquire by purchase or gift. We agree with defendant.

[1-4] It is elementary that a statute should be construed so as to hold it con-

tutional if possible. *State v. Pagel*, 16 .App. 412, 415, 518 P.2d 1037, Sup.Ct. *re- ew denied, cert. denied* 419 U.S. 867, 95 Ct. 124, 42 L.Ed.2d 105 (1974); *City of rtland v. Kreutz*, 7 Or.App. 618, 621–22, 2 P.2d 824 (1972). We have already ap- ed this rule to this very Act in *State ey. Comm. v. Chaparral Rec.*, 13 Or.App. 3, 352, 510 P.2d 352, 355 (1973), where said:

"Given two constructions of the Act, one of which would hold it in part in- valid, and the other valid, we apply the one that avoids declaring it invalid in any respect. [Citations omitted.]"

e rule in this state is that an easement an interest in land. *State v. Calif. Ore. ver Co.*, 225 Or. 604, 609, 358 P.2d 524 '61); *Steelhammer v. Clackamas Co.*, 170 505, 515, 133 P.2d 292 (1943). The e may be required to pay for ease- s it has taken or extinguished. *Thorn- v. Port of Portland*, 233 Or. 178, 183, .2d 100 (1962); *State Highway Com. rk*, 200 Or. 211, 228, 265 P.2d 783). If the statute were construed to he state a property interest in land any right of compensation, the might well violate Oregon Consti- Art. I, § 18, set forth in n. 1, supra. e conclude there is a reasonable way true the statute without this pos- of violating the constitution, that ion should be adopted.

are only four references to "scenic " in the entire Act. The term ainly in clauses describing ways the state may or may not acquire ments. The state does not, un- ct, automatically acquire an in- e related adjacent land.

eason why we reject plaintiff's that the Act gives the state a ment" in all related adjacent under that interpretation the the statute conflict with each he court should construe the the Act so that they harmo- *cad v. Lincoln Cas. Ins. Co.*, 183, 374 P.2d 751 (1962). Under the Act, a landowner may use his land in a way that violates its standards if he makes a proposal and then waits a year. It would be a contradiction in the Act if it were to give the state an easement and also provide that the conditions of the easement could be broken.

[5] We think it clear that the regulatory provisions of the Act are separate from the provisions giving the state the right to acquire land or interests in related adjacent land, and that the state did not acquire an easement in plaintiff's property merely by the adoption of the Act.

We now turn to plaintiff's next claim, that the state's power to regulate under the Act constitutes a taking for which compensation must be paid. Under the Scenic Waterways Act, the most severe limitation that can be placed on a landowner who wants to use his land in a way that the department finds impairs the beauty of the scenic waterway is that he may have to wait a maximum of a year before proceeding. The restriction is but a temporary one. Since we are aware of no similar Act, we think zoning law here offers an appropriate analogy.

[6, 7] Plaintiff contends that the regulatory provisions of the Act can only be exercised under the power of eminent domain. We disagree.

> "* * * The distinguishing characteristic between eminent domain and the police power is that the former involves the *taking* of property because of its need for the public use while the latter involves the *regulation* of such property to prevent the use thereof in a manner that is detrimental to the public interest. The police power may be loosely described as the power of the sovereign to prevent persons under its jurisdiction from conducting themselves or using their property to the detriment of the general welfare." (Footnotes omitted; emphasis in original.) 1 Nichols, Eminent Domain 1–104, 1–105, § 1.42 (3d ed. rev. 1975).

The Scenic Waterways Act is aimed at preventing the uses of land along free-flowing rivers in ways that destroy the character of those rivers. The land is not taken by the government, nor is the public allowed to use any privately owned land. The Act seeks only to prevent the destruction by the landowners of the scenic character of the rivers. That the public has no right to use these lands under the Act is emphasized by OAR 734-50-017, which prohibits the public from interfering with activities along the rivers and expressly states in subsection (1) that the public is not given any right to trespass on private lands along scenic waterways.

Before discussing the validity of these restrictions viewed in the light of zoning legislation, we note that ORS 390.845(2) requires the department to adopt rules and regulations governing the management of related adjacent land and sets forth some standards the department is to follow. The department has adopted regulations which appear in Oregon Administrative Rules, ch. 734, §§ 50-005 to 50-040. These regulations notify owners of related adjacent land of requirements for applications, types of uses that do not require applications, and guidelines for making proposed uses in harmony with the scenic character of the area. Section 50-022 classifies sections of the scenic waterways/rivers according to remoteness and type of use at the time the Act went into effect, and provides guidelines for the types of uses that will be given permission in each of the classified areas.

[8] The sections of the Act and regulations under it describing the application procedure contemplate that the department will act promptly in passing on an application. ORS 390.845(4, 5); OAR 734-50-020(1), 50-025, 50-030. No contention is made here of any arbitrary or unnecessary delay in processing plaintiff's application.

[9] It is well established that the power to limit use of land through zoning regulation is within the police power of the state. In *Jehovah's Witnesses v. Mullen*, 214 Or. 281, 330 P.2d 5, 74 A.L.R.2d 347 (1958), *cert. denied* 359 U.S. 436, 79 S.Ct. 940, 3 L.Ed.2d 932 (1959), the Supreme Court made this statement about appellate review of a zoning regulation:

> "As an exercise of the police power, the courts will review such zoning ordinances to determine whether they are a proper employment of that power, i. e., whether they are reasonable or arbitrary and have a substantial relation to the public health, comfort, morals or welfare. [Citations omitted.] The courts will not, however, interfere unless the action was clearly unreasonable and arbitrary and had no substantial relation to the legitimate objects sought to be gained, and will not review it if the question is fairly debatable. [Citations omitted.]" 214 Or. at 307, 330 P.2d at 17.

The objectives of the Act are given in ORS 390.815, set out above. Some of these aims are traditionally within the scope of the police power; others are aesthetic. In *Oregon City v. Hartke*, 240 Or. 35, 49, 400 P.2d 255, 262 (1965), the Supreme Court in a zoning case said:

> "We join in the view 'that aesthetic considerations alone may warrant an exercise of the police power.'"

[10] The next challenge is whether the particular provisions of the Scenic Waterways Act are reasonable in light of the objectives. The Supreme Court in *Anthony v. Veatch*, 189 Or. 462, 500, 220 P.2d 493, 509, 221 P.2d 575 (1950), *appeal dismissed* 340 U.S. 923, 71 S.Ct. 499, 95 L.Ed. 667 (1951), a case also involving a law adopted by initiative, said:

> "* * * [W]hile the legislature is not the final judge of the limitations of that [police] power, and legislative action in that regard must be limited to such as is reasonably necessary for the public benefit, yet it is the legislative function primarily to determine the necessity or expediency of measures adopted; and

that, when the courts are called upon to apply the judicial test of reasonableness, they will accord to the legislative authority, whether legislature or people, a [legal] discretion in determining, not only what the public interest requires, but also what measures are necessary for the protection of such interests, the presumption being in favor of the reasonableness and validity of the regulation. * * *"

We conclude that the challenged regulatory provisions of the Act are reasonable in light of its objectives.

In *Multnomah County v. Howell*, 9 Or. App. 374, 496 P.2d 235 (1972), Sup.Ct. *review denied* (1973), this court considered a challenge to a restrictive zoning regulation and said:

"We reach the conclusion that the subject ordinance does not bar defendant from making any beneficial use of his property; and that there is available under the ordinance a procedure whereby defendant can, if he so desires, submit a new and different proposal which could enable him to make use of his lots for residential purposes. * * *

"* * *

"Cases cited and relied upon by defendant are not applicable since here the zoning ordinance does not have the effect of prohibiting the landowner from making any future beneficial use of the property zoned. * * *" (Footnote omitted.) 9 Or.App. at 382, 383-84, 496 P.2d at 239.

Under the Scenic Waterways Act, plaintiff can continue to use her property as it was before the Act. She can seek permission to make new uses consistent with the Act and negotiate with the department to get such permission, or, after making a proposal that does not meet the standards of the Act and regulations, she may carry it out after waiting a maximum of one year. Under any of these possibilities, she will be able to make future beneficial use of the property. If the defendant elects to condemn, she will receive the constitutionally required compensation.

In *Oregon City v. Hartke*, supra, the Supreme Court upheld the constitutionality of a zoning regulation that completely excluded a common type of land use, automobile wrecking yards, from the city. In considering the issue the court said:

"We hold that it is within the police power of the city wholly to exclude a particular use if there is a rational basis for the exclusion. The city commission has the responsibility for the planning and development of the city in a manner which meets the needs of the community. The commission may interpret those needs as including the elimination of uses which are not in keeping with the character of the city as it then exists or as the community would desire it to be in the future. It is not irrational for those who must live in a community from day to day to plan their physical surroundings in such a way that unsightliness is minimized. The prevention of unsightliness by wholly precluding a particular use within the city may inhibit economic growth [for] the city or frustrate the desire of someone who wishes to make the proscribed use, but the inhabitants of the city have the right to forego the economic gain and the person whose business plans are frustrated is not entitled to have his interest weighed more heavily than the predominant interest of others in the community." (Footnote omitted.) 240 Or., at 49-50, 400 P.2d at 263.

This principle has equal application to the Scenic Waterways Act.

[11] We hold that the regulatory powers given the state under the Scenic Waterways Act do not constitute a taking of the land regulated.

Finally, in addition to her contentions that she should be compensated, plaintiff contends that if the Scenic Waterways Act is valid as analogous to zoning legislation, then it is unconstitutional because it is "freezing" legislation designed to depress

the price of land so that the government can purchase it at a low price. In Annotation, 36 A.L.R.3d 751, 755 (1971), the annotator sets forth the general rules deducible from the authorities therein cited, as follows:

> "The results reached by the courts in those cases involving the assertion that a 'freezing' statute or ordinance was invalid as violating constitutional requirements of due process of law have seemingly depended in large measure on whether, in the light of the particular circumstances disclosed by the evidence, the statute or ordinance could be said to be a reasonable enactment for the public safety, health, morals, or general welfare, or whether such statute amounted instead to an arbitrary, unreasonable, and discriminatory restraint upon the use of private property. On the other hand, the question most frequently presented in those cases wherein a 'freezing' statute or ordinance was attacked as violative of constitutional prohibitions against the taking of private property without just compensation has been whether the enactment in question was actually adopted in the interests of the public health, safety, morals, or general welfare, or whether, under the guise of the police power, it was adopted merely as a means of holding down or depressing land values in order to minimize the costs of acquisition of property in contemplated future condemnation proceedings.
>
> "The line of demarcation between the valid exercise of the police power and constitutional guaranties is not well-defined, and thus, in determining whether or not particular 'freezing' statutes or ordinances were violative of constitutional prohibitions against deprivation of property without due process of law and the taking of private property for public use without just compensation, the courts have generally adopted an ad hoc approach and have grounded their decisions in large measure upon the particular and peculiar facts and circumstances of each case." (Footnote omitted.)

The purpose of this Act as stated in ORS 390.815 is clearly to preserve the scenic and natural character of the named free-flowing scenic rivers. Its time factors are not designed to freeze land values to subsidize later acquisition by or for the public, nor does it contemplate or impose an arbitrary, unreasonable or discriminatory restraint upon the landowner. Indeed such restraints as it does impose are far less than those long established as valid under zoning laws. The emphasis in the Act is on the regulatory, zoning-type provisions and not on the condemnation of land, although power to condemn land is given. ORS 390.845(7).

[12] We find that the waiting period has the purpose of encouraging negotiation between the landowner and the department in an attempt to find a use that does not impair the beauty of the river area and of giving the department reasonable time to decide whether to condemn land when agreement cannot be reached. We conclude that the one-year waiting period is not designed to freeze or depress land values before condemnation and is

> "* * * a reasonable enactment for the public safety, health, morals, or general welfare * * *." 36 A.L.R.3d, *supra* at 755.

Since plaintiff is now free, in the absence of any condemnation effort, to use her land for the purposes described in her proposal, we find it unnecessary to consider her contention that the Act does not provide any notice and hearing before the department as she urges are required in a quasi-judicial type of proceeding under the rule of *Fasano v. Washington Co. Comm.*, 264 Or. 574, 507 P.2d 23 (1973).

In the view we have taken of this case we find it unnecessary to consider the remaining contentions of the parties.

We affirm the trial court's dismissal of plaintiff's complaint.

APPENDIX NO. 9

Georgia Scenic Rivers Act of 1969, G.C.A. §§17-902 to 17-905.

CHAPTER 17-9. GEORGIA SCENIC RIVERS ACT OF 1969.

Sec.

17-901. Short title of Chapter.

17-902. Definitions.

17-903. Scenic river system.

17-904. Duties of State Council for the Preservation of Natural Areas; studies of certain rivers; classification of scenic rivers.

17-905. Preservation of scenic rivers.

17-901. Short title of Chapter.—This Chapter shall be known and may be cited as the "Georgia Scenic Rivers Act of 1969."

(Acts 1969, p. 933.)

17-902. Definitions.—Unless clearly indicated otherwise by the context, the following terms shall have the meanings ascribed to them:

(a) "Scenic river" means certain rivers or sections of rivers of the State of Georgia which have valuable scenic, recreational or natural characteristics which should be preserved for the benefit and enjoyment of present and future generations.

(b) "Council" shall mean the State Council for the Preservation of Natural Areas established by Chapter 43-12.

(c) "River" means a flowing body of water or a section, portion or tributary thereof, including rivers, streams, creeks, branches or small lakes.

(d) "Free-flowing," as applied to any river or section of a river, means existing or flowing in natural condition without impoundment, diversion, straightening, rip-rapping, or other modification of the waterway.

(e) "Scenic easement" means an interest in land which limits the use of land along the shoreline of a scenic river for the purpose of protecting the scenic, recreational or natural characteristics of the area.

(Acts 1969, p. 933.)

17-903. Scenic river system.—The Georgia Scenic River System shall comprise each river or section of a river hereafter designated a scenic river by Act of the General Assembly.

(Acts 1969, pp. 933, 934.)

17-904. Duties of State Council for the Preservation of Natural Areas; studies of certain rivers; classification of scenic rivers.—(a) The council shall study and from time to time recommend to the Governor and General Assembly rivers or sections of rivers to be considered for designation as scenic rivers. Each recommendation shall be accompanied by a report showing the proposed area, classification, the characteristics which qualify the river or section of river for designation as a scenic river, ownership and use of land in the area, the State agency by which the area should be administered, the estimated costs of acquiring fee title and scenic easements and of administering the area as a scenic river. The council may conduct such studies in cooperation with appropriate agencies of the State of Georgia and the United States, and may apply for and receive funds therefor from the Land and Water Conservation Fund and other Federal sources: Provided, however, such studies and/or projects must first be approved by the person or persons appointed by the Governor for liaison purposes with certain Federal agencies under the terms of Public Law 90-542 (82 STAT. 906), approved October 2, 1968, said law having been designated the "Wild and Scenic Rivers Act."

(b) The council shall proceed to make a study of each of the following rivers and make a report of its findings and recommendations to the Governor and the General Assembly:

(1) Suwanee River. From its source in the Okefenokee Swamp to point where it flows out of the State of Georgia.

(2) Chattooga River. The section of the river within the State of Georgia.

(c) Each scenic river together with the land lying within its authorized boundary, as established by the General Assembly, shall be classified as one of the following:

(1) Natural river areas. Free-flowing rivers or sections of rivers generally inaccessible except by trail, with shorelines undeveloped and unused.

(2) Pastoral river areas. Free-flowing rivers or sections of rivers accessible by roads, with shorelines mostly undeveloped and unused.

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(3) Recreational river areas. Free-flowing rivers or sections of rivers accessible by roads, with limited development along the shorelines.

(Acts 1969, pp. 933, 934.)

17-905. Preservation of scenic rivers.—After designation of any river or section of a river as a scenic river by the General Assembly pursuant to section 17-903:

(a) No dam, reservoir or other structure impending the natural flow of the waterway shall be constructed, operated or maintained in such river or section of river so designated as a scenic river, unless specifically authorized by an Act of the General Assembly.

(b) The council may acquire by purchase, gift, grant, bequest, devise, lease or otherwise fee title or any lesser interest in the land lying within the authorized boundary of such river or section of river hereafter so designated as a scenic river. Any interest in land acquired by the council pursuant to this section shall be transferred to such governmental agency as the General Assembly may by Act direct.

(Acts 1969, pp. 933, 935.)

CHAPTER 17-10. DISPLAY OF WATERCRAFT INFORMATION.

Sec.		Sec.	
17-1001.	Definitions.	17-1005.	Capacity plate may be affixed by any person; manufacturer not relieved from liability.
17-1002.	Unlawful to manufacture or sell watercraft to which capacity plate has not been attached.	17-1006.	Warranty.
17-1003.	Information to be included on capacity plate.	17-1007.	Alternative compliance with capacity plate requirements.
17-1004.	Methods and formulas for determining maximum capacity.	17-1008	Exemptions.
		17-1009.	Rules and regulations.
		17-1010.	Watercraft manufactured for personal use.

Editorial Note.—Acts 1971, p. 419, upon which this Chapter is based, states in Section 11 thereof that it shall apply to watercraft manufactured after January 1, 1972.

17-1001. Definitions.—Unless the contents of this Chapter clearly require otherwise, the following words and phrases shall have the following meanings:

(a) "Manufacturer" shall mean a person, firm or corporation who constructs or assembles a watercraft or alters a watercraft in such manner as to change its weight capacity.

(b) "Watercraft" shall mean any boat, vessel or craft, other than a seaplane, used, or capable of being used, as a means of transportation on water which is less than 26 feet in length and is designed to carry two or more persons.

APPENDIX NO. 10

North Carolina Natural and Scenic Rivers System, Gen. Stat. N.C. §§113A-30 to 113A-43.

ARTICLE 3.

Natural and Scenic Rivers System.

§ 113A-30. Short title. — This Article shall be known and may be cited as the "Natural and Scenic Rivers Act of 1971." (1971, c. 1167, s. 2.)

§ 113A-31. Declaration of policy. — The General Assembly finds that certain rivers of North Carolina possess outstanding natural, scenic, educational, geological, recreational, historic, fish and wildlife, scientific and cultural values of great present and future benefit to the people. The General Assembly further finds as policy the necessity for a rational balance between the conduct of man and the preservation of the natural beauty along the many rivers of the State. This policy includes retaining the natural and scenic conditions in some of the State's valuable rivers by maintaining them in a free-flowing state and to protect their water quality and adjacent lands by retaining these natural and scenic conditions. It is further declared that the preservation of certain rivers or segments of rivers in their natural and scenic condition constitutes a beneficial public purpose. (1971, c. 1167, s. 2.)

§ 113A-32. Declaration of purpose. — The purpose of this Article is to implement the policy as set out in G.S. 113A-31 by instituting a North Carolina natural and scenic rivers system, and by prescribing methods for inclusion of components to the system from time to time. (1971, c. 1167, s. 2.)

§ 113A-33. Definitions. — As used in this Article, unless the context requires otherwise:

(1) "Department" means the Department of Natural and Economic Resources.

(2) "Free-flowing," as applied to any river or section of a river, means existing or flowing in natural condition without substantial impoundment, diversion, straightening, rip-rapping, or other modification of the waterway. The existence of low dams, diversion works, and other minor structures at the time any river is proposed for inclusion in the North Carolina natural and scenic rivers system shall not automatically bar its consideration for such inclusion: Provided, that this shall not be construed to authorize, intend, or encourage future construction of such structures within components of the system.

(3) "River" means a flowing body of water or estuary or a section, portion, or tributary thereof, including rivers, streams, creeks, runs, kills, rills, and small lakes.

(4) "Road" means public or private highway, hard-surface road, dirt road, or railroad.

(5) "Scenic easement" means a perpetual easement in land which (i) is held for the benefit of the people of North Carolina, (ii) is specifically enforceable by its holder or beneficiary, and (iii) limits or obligates the holder of the servient estate, his heirs, and assigns with respect to their use and management of the land and activities conducted thereon. The object of such limitations and obligations is the maintenance or enhancement of the natural beauty of the land in question or of the areas affected by it. (1971, c. 1167, s. 2; 1973, c. 1262, s. 86.)

Editor's Note. — The 1973 amendment substituted "Department of Natural and Economic Resources" for "Department of Conservation and Development" in subdivision (1).

§ 113A-34. Types of scenic rivers. — The following types of rivers are eligible for inclusion in the North Carolina natural and scenic rivers system:

Class I. Natural river areas. Those free-flowing rivers or segments of rivers and adjacent lands existing in a natural condition. Those rivers or segments of rivers that are free of man-made impoundments and generally inaccessible except by trail, with the lands within the boundaries essentially primitive and the waters essentially unpolluted. These represent vestiges of primitive America.

Class II. Scenic river areas. Those rivers or segments of rivers that are largely free of impoundments, with the lands within the boundaries largely primitive and largely undeveloped, but accessible in places by roads. (1971, c. 1167, s. 2.)

§ 113A-35. Criteria for system. — For the inclusion of any river or segment of river in the natural and scenic rivers system, the following criteria must be present:

(1) River segment length — must be no less than one mile.

(2) Boundaries — of the system shall be the visual horizon or such distance from each shoreline as may be determined to be necessary by the Secretary, but shall not be less than 20 feet. Provided, that this shall not be construed to authorize the Secretary to acquire, except by donation or gift, more than 320 acres of land per mile for inclusion within the boundaries.

(3) Water quality — shall not be less than that required for Class "C" waters as established by the North Carolina Environmental Management Commission.

(4) Water flow — shall be sufficient to assure a continuous flow and shall not be subjected to withdrawal or regulation to the extent of substantially altering the natural ecology of the stream.

(5) Public access — shall be limited, but may be permitted to the extent deemed proper by the Secretary, and in keeping with the property interest acquired by the Department and the purpose of this Article. (1971, c. 1167, s. 2; 1973, c. 1262, ss. 23, 86.)

Editor's Note. — The 1973 amendment substituted "Secretary" for "Director" in subdivisions (2) and (5) and "Environmental Management Commission" for "Board of Water and Air Resources" in subdivision (3).

§ 113A-35.1. Components of system. — That segment of the New River which extends from the confluence of the north and south forks of the New River in Ashe County through Ashe and Alleghany Counties to the Virginia line shall be a scenic river area and shall be included in the North Carolina Natural and Scenic Rivers System. (1973, c. 879.)

§ 113A-36. Administrative agency; federal grants; additions to the system; regulations. — (a) The Department of Natural and Economic Resources is the agency of the State of North Carolina with the duties and responsibilities to administer and control the North Carolina natural and scenic rivers system.

(b) The Department shall be the agency of the State with the authority to accept federal grants of assistance in planning, developing (which would include the acquisition of land or an interest in land), and administrating the natural and scenic rivers system.

(c) The Secretary of the Department shall study and from time to time submit to the Governor and to the General Assembly proposals for the additions to the system of rivers and segments of rivers which, in his judgment, fall within one or more of the categories set out in G.S. 113A-34. Each proposal shall specify the category of the proposed addition and shall be accompanied by a detailed report of the facts which, in the Secretary's judgment, makes the area a worthy addition to the system.

Before submitting any proposal to the Governor or the General Assembly for the addition to the system of a river or segment of a river, the Secretary or his authorized representative, shall hold a public hearing in the county or counties where said river or segment of river is situated. Notice of such public hearing shall be given by publishing a notice once each week for two consecutive weeks in a newspaper having general circulation in the county where said hearing is to be held, the second of said notices appearing not less than 10 days before said hearing. Any person attending said hearing shall be given an opportunity to be heard. Notwithstanding the provisions of the foregoing, no public hearing shall be required with respect to a river bounded solely by the property of one owner, who consents in writing to the addition of such river to the system.

The Department shall also conduct an investigation on the feasibility of the inclusion of a river or a segment of river within the system and file a written report with the Governor when submitting a proposal.

The Department shall also, before submitting such a proposal to the Governor or the General Assembly, notify in writing the owner, lessee, or tenant of any lands adjoining said river or segment of river of its intention to make such proposal. In the event the Department, after due diligence, is unable to determine the owner or lessee of any such land, the Department may publish a notice for four successive weeks in a newspaper having general circulation in the county where the land is situated of its intention to make a proposal to the Governor or General Assembly for the addition of a river or segment of river to the system.

(d) The Department of Natural and Economic Resources may establish reasonable regulations for the purpose of carrying out the provisions of this Article. (1971, c. 1167, s. 2; 1973, c. 911; c. 1262, ss. 28, 86.)

Editor's Note. — The first 1973 amendment added the second, third and fourth paragraphs of subsection (c).

The second 1973 amendment substituted "Department of Natural and Economic Resources" for "Department of Conservation and Development" in subsection (a) and for "Board of Conservation and Development" in subsection (d) and substituted "Secretary" for "Director" and "Secretary's" for "Director's" in subsection (e).

§ 113A-37. Raising the status of an area. — Whenever in the judgment of the Secretary of the Department a scenic river segment has been sufficiently restored and enhanced in its natural scenic and recreational qualities, such segment may be reclassified with the approval of the Department, to a natural river area status and thereafter administered accordingly. (1971, c. 1167, s. 2; 1973, c. 1262, ss. 28, 86.)

Editor's Note. — The 1973 amendment substituted "Secretary" for "Director" near the beginning of the section and "Department" for "Board" near the end of the section.

§ 113A-38. Land acquisition. — (a) The Department of Administration is authorized to acquire for the Department of Natural and Economic Resources, within the boundaries of a river or segment of river as set out in G.S. 113A-35 on behalf of the State of North Carolina, lands in fee title or a lesser interest in land, preferably "scenic easements." Acquisition of land or interest therein may be by donation, purchase with donated or appropriated funds, exchange or otherwise.

(b) The Department of Administration in acquiring real property or a property interest therein as set out in this Article shall have and may exercise the power of eminent domain in accordance with the provisions of Article 2, Chapter 40, of the General Statutes, as amended. (1971, c. 1167, s. 2; 1973, c. 1262, s. 86.)

Editor's Note. — The 1973 amendment substituted "Department of Natural and Economic Resources" for "Department of Conservation and Development" in subsection (a).

§ 113A-39. Claim and allowance of charitable deduction for contribution or gift of easement. — The contribution or donation of a "scenic easement," right-of-way or any other easement or interest in land to the State of North Carolina, as provided in this Article, shall be deemed a contribution to the State of North Carolina within the provisions of G.S. 105-130.9 and 105-147(16). The value of the contribution or donation shall be the fair market value of the easement or other interest in land when the contribution or donation is made. (1971, c. 1167, s. 2.)

§ 113A-40. Component as part of State park, wildlife refuge, etc. — Any component of the State natural and scenic rivers system that is or shall become a part of any State park, wildlife refuge, or state-owned area shall be subject to the provisions of this Article and the Articles under which the other areas may be administered, and in the case of conflict between the provisions of these Articles the more restrictive provisions shall apply. (1971, c. 1167, s. 2.)

§ 113A-41. Component as part of national wild and scenic river system. — Nothing in this Article shall preclude a river or segment of a river from becoming part of the national wild and scenic river system. The Secretary of the Department is directed to encourage and assist any federal studies for the inclusion of North Carolina rivers in the national system. The Secretary may enter into cooperative agreements for joint federal-state administration of a North Carolina river or segment of river: Provided, that such agreements

relating to water and land use are not less restrictive than the requirements of this Article. (1971, c. 1167, s. 2; 1973, c. 1262, s. 86.)

Editor's Note. — The 1973 amendment substituted "Secretary" for "Director" in two places.

§ 113A-42. Violations. — (a) Civil Action. — Whoever violates, fails, neglects or refuses to obey any provision of this Article or regulation or order of the Secretary of Natural and Economic Resources may be compelled to comply with or obey the same by injunction, mandamus, or other appropriate remedy.

(b) Penalties. — Whoever violates, fails, neglects or refuses to obey any provision of this Article or regulation or order of the Secretary of Natural and Economic Resources is guilty of a misdemeanor and may be punished by a fine of not more than fifty dollars ($50.00) for each violation, and each day such person shall fail to comply, where feasible, after having been officially notified by the Department shall constitute a separate offense subject to the foregoing penalty. (1971, c. 1167, s. 2; 1973, c. 1262, s. 86.)

Editor's Note. — The 1973 amendment substituted "Secretary of Natural and Economic Resources" for "Director of the Department of Conservation and Development" in subsections (a) and (b).

§ 113A-43. Authorization of advances. — The Department of Administration is hereby authorized to advance from land-purchase appropriations necessary amounts for the purchase of land in those cases where reimbursement will be later effected by the Bureau of Outdoor Recreation of the United States Department of the Interior. (1971, c. 1167, s. 2.)

§§ 113A-44 to 113A-49: Reserved for future codification purposes.

Article 4.

Sedimentation Pollution Control Act of 1973.

§ 113A-50. Short title. — This Article shall be known as and may be cited as the "Sedimentation Pollution Control Act of 1973." (1973, c. 392, s. 1.)

Editor's Note. — Session Laws 1973, c. 392, s. 18, contains a severability clause.

§ 113A-51. Preamble. — The sedimentation of streams, lakes and other waters of this State constitutes a major pollution problem. Sedimentation occurs from the erosion or depositing of soil and other materials into the waters, principally from construction sites and road maintenance. The continued development of this State will result in an intensification of pollution through sedimentation unless timely and appropriate action is taken. Control of erosion and sedimentation is deemed vital to the public interest and necessary to the public health and welfare, and expenditures of funds for erosion and sedimentation control programs shall be deemed for a public purpose. It is the purpose of this Article to provide for the creation, administration, and enforcement of a program and for the adoption of minimal mandatory standards which will permit development of this State to continue with the least detrimental effects from pollution by sedimentation. (1973, c. 392, s. 2.)

§ 113A-52. Definitions. — As used in this Article, unless the context otherwise requires:

APPENDIX NO. 11

Ohio Wild, Scenic or Recreational Rivers Act. O.R.C. §§1501.16 to 1501.19.

§1501.16 Creation of wild, scenic, or recreational river areas.

As used in sections 1501.16 to 1501.19 of the Revised Code, "watercourse" means a substantially natural channel with recognized banks and bottom, in which a flow of water occurs, with an average of at least ten feet mean surface water width and at least five miles of length. The director of natural resources may create, supervise, operate, protect, and maintain wild, scenic, and recreational river areas, under the classifications contained in section 1501.161 [1501.16.1] of the Revised Code. The director may prepare and maintain a plan for the establishment, development, use, and administration of such areas as a part of the comprehensive state plans for water management and outdoor recreation. The director may cooperate with federal agencies administering any federal program concerning wild, scenic, or recreational river areas.

The director may propose for establishment as a wild, scenic, or recreational river area a part or parts of any watercourse in this state, with adjacent lands, which in his judgment possesses water conservation, scenic, fish, wildlife, historic, or outdoor recreation values which should be preserved, using the classifications contained in section 1501.161 [1501.16.1] of the Revised Code. The area shall include lands adjacent to the watercourse in sufficient width to preserve, protect, and develop the natural character of the watercourse, but may not include any lands more than one thousand feet from the normal waterlines of the watercourse unless an additional width is necessary to preserve water conservation, scenic, fish, wildlife, historic, or outdoor recreation values.

The director shall publish his intention to declare an area a wild, scenic, or recreational river area at least once in a newspaper of general circulation in each county, any part of which is within the area, and shall send written notice of such intention to the legislative authority of each county, township, and municipal corporation and to each conservancy district, any part of which is within the area, and to the director of † transportation, the director of economic and community development, the director of administrative services, and the director of environmental protection. Such notices shall include a copy of a map and description of the area.

After thirty days from the last date of publication or dispatch of written notice as required in this section, the director shall enter a declaration in his journal that the area is a wild, scenic, or recreational river area. When so entered, the area is a wild, scenic, or recreational river area. The director, after thirty days notice as prescribed in this section and upon the approval of the recreation and resources commission, may terminate the status of an area as a wild, scenic, or recreational river area by an entry in his journal.

Declaration by the director that an area is a wild, scenic, or recreational river area does not authorize the director or any governmental agency or political subdivision to restrict the use of land by the owner thereof or any person acting under his authority, or to enter upon such land.

HISTORY: 132 v S 545 (Eff 6-5-68); 134 v S 105 (Eff 8-30-72); 134 v S 485 (Eff 10-18-72); 134 v S 297 (Eff 10-23-72); 135 v H 200 (Eff 9-28-73); 135 v S 174. Eff 12-4-75.

† This change was made by the H 200 amendment.

Law Review

Ohio's park systems: an appraisal, 32 OSLJ 818.

[§ 1501.16.1] § 1501.161 River classifications.

In creating wild, scenic, or recreational river areas the director of natural resources shall use the following classifications:

(A) "Wild river area" to include those rivers or sections of rivers that are free of impoundments and generally inaccessible except by trail, with watersheds or shorelines essentially primitive and waters unpolluted, representing vestiges of primitive America;

(B) "Scenic river area" to include those rivers or sections of rivers that are free of impoundments, with shorelines or watersheds still largely primitive and shorelines largely undeveloped but accessible in places by roads;

(C) "Recreational river areas" to include those rivers or sections of rivers that are readily accessible by road or railroad, that may have some development along their shorelines, and that may have undergone some impoundment or diversion in the past.

HISTORY: 134 v S 108. Eff 8-31-72.

§ 1501.17 Structures and channel modifications must be approved.

No state department, agency, or political subdivision may build or enlarge any highway, road, or structure or modify or cause to modify the channel of any watercourse within a wild, scenic, or recreational river area outside the limits of a municipal corporation without having first obtained approval of the plans for such highway, road, or structure or channel modification from the director of natural resources. The common pleas court having jurisdiction shall, upon petition by the director, enjoin work on any highway, road, or structure or channel modification for which such approval has not been obtained.

HISTORY: 132 v S 345 (Eff 6-5-68); 134 v S 108. Eff 8-31-72.

§ 1501.18 Administration of program and areas; construction of facilities.

The director of natural resources may administer federal financial assistance programs for wild, scenic, and recreational river areas.

The director may make a lease or agreement with a political subdivision to administer all or part of a wild, scenic, or recreational river area.

The director may acquire real property or any estate, right, or interest therein for protection and public recreational use as wild, scenic, or recreational river area.

The director may expend funds for acquisition, protection, construction, maintenance, and administration of real property and public use facilities in wild, scenic, or recreational river areas, when the funds are so appropriated by the general assembly. The director may condition such expenditures, acquisition of land or easements, or construction of facilities within a wild, scenic, or recreational river area, upon adoption and enforcement of adequate flood plain zoning regulations.

HISTORY: 132 v S 345 (Eff 6-5-68); 134 v S 108. Eff 8-31-72.

§ 1501.19 Advisory councils.

The director of natural resources shall appoint an advisory council for each wild, scenic, or recreational river area, composed of not more than ten persons who are representative of local government and local organizations and interests in the vicinity of the wild, scenic, or recreational river area, who shall serve without compensation. The council shall advise the director on acquisition of land and easements, and the lands and waters which should be included in a wild, scenic, or recreational river area or a proposed wild, scenic, or recreational river area, facilities therein, and other aspects of establishment and administration of the ◇ area which may affect the local interest.

HISTORY: 132 v S 345 (Eff 6-5-68); 134 v S 108. Eff 8-31-72.

§ 1501.20 Pollution control program.

The Ohio soil and water conservation commission shall recommend to the director of natural resources a procedure for coordination of a program of agricultural pollution abatement and urban sedimentary pollution control. Implementation of such a program shall be based on the standards for air and water quality determined by the director of environmental protection. The director of natural resources shall, through the division of soil and water districts, coordinate the efforts of state and local governmental agencies to meet the minimum state air and water quality standards relating to agricultural pollutants and urban sedimentary pollutants. The director of environmental protection shall utilize the department of natural resources, the division of soil and water districts, and local soil and water conservation districts in encouraging landowner abatement of agricultural pollution and urban sediment pollution.

HISTORY: 132 v H 314 (Eff 12-14-67); 134 v S 397. Eff 10-23-72.

This section was formerly numbered RC § 1501.20.1 [134 v S 305].

For text of former section RC § 1501.20 (132 v H 314), see RC § 6111.41.

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APPENDIX NO. 12

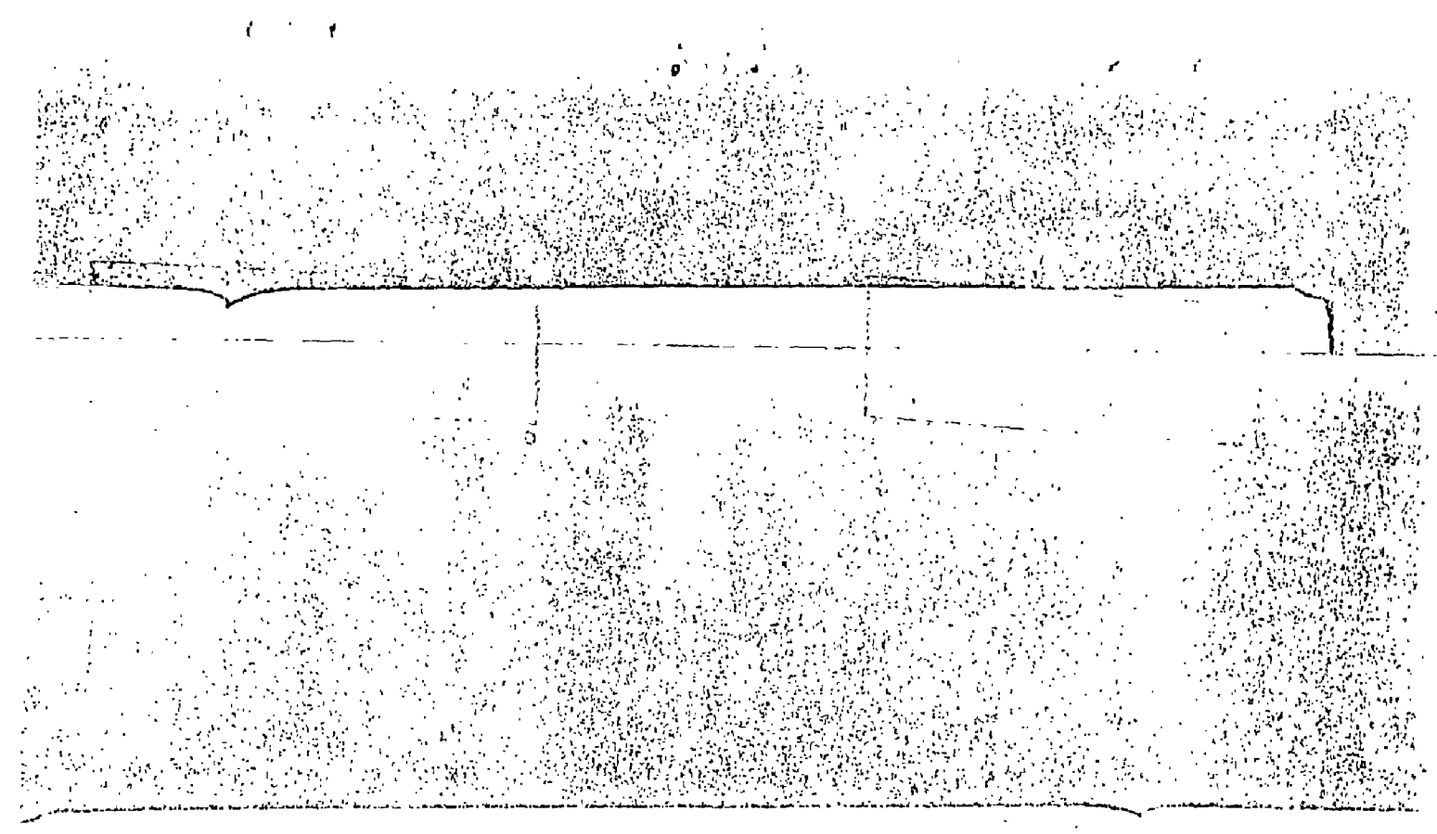
California Wild and Scenic Rivers Act, Public Resources Code §5093.50 to 5093.69 (1975 Pocket Part.)

CHAPTER 1.4 CALIFORNIA WILD AND SCENIC RIVERS ACT [NEW]

Sec.

5093.50 Legislative declaration.
5093.51 Short title.
5093.52 Definitions.
5093.53 Classification of rivers.
5093.54 Components of system.
5093.55 Restrictions on construction of dams, reservoirs, other impoundments and diversion facilities.
5093.56 Prohibition against governmental cooperation in projects affecting system; exception, Eel River.
5093.57 Eel River; flood protection.
5093.58 Duties of secretary.
5093.59 Management plan; hearings.
5093.60 Administration of system.
5093.61 Local powers; water pollution
5093.62 Fish and wildlife.
5093.63 Eminent domain
5093.64 Severability
5093.65 Kings River; construction of water impoundment facility, moratorium until January 1, 1979 [New]
5093.66 to 5093.69. Inoperative.

Asterisks * * * Indicate deletions by amendment



Chapter 1.4 was added by Stats.1972, c. 1259, p. 2510, § 1.

Stanislaus River Protection Act of 1974
Addition of this Act, proposed by Initiative Measure, 1974, which would have added sections 5093.66 to 5093.69, was rejected by the electors at the general election held Nov. 5, 1974.

§ 5093.50 Legislative declaration

It is the policy of the State of California that certain rivers which possess extraordinary scenic, recreational, fishery or wildlife values, shall be preserved in their free-flowing state, together with their immediate environments, for the benefit and enjoyment of the people of the state. The Legislature declares that such use of these rivers is the highest and most beneficial use and is a reasonable and beneficial use of water within the meaning of Section 3 of Article XIV of the State Constitution. It is the purpose of this chapter to create a California Wild and Scenic Rivers System to be administered in accordance with the provisions of this chapter.

(Added by Stats.1972, c. 1259, p. 2510, § 1.)

1. In general
Where the bond act (Water C. § 12930 et seq.) was approved by the voters and authorized the department of water resources to construct additional water development facilities in certain watersheds, a subsequent act of the legislature (Stats.1972, c. 1259) restricting such facilities would not prohibit construction unless a bond act amendment is approved by the voters. Op.Leg Counsel, 1972 A.J. 880.

§ 5093.51 Short title

This chapter shall be known as the California Wild and Scenic Rivers Act.
(Added by Stats.1972, c. 1259, p. 2510, § 1.)

§ 5093.52 Definitions

As used in this chapter:

(a) "Secretary" means the Secretary of the Resources Agency.

(b) "Resources Agency" means the Secretary of the Resources Agency and such constituent units of the Resources Agency as the secretary deems necessary to accomplish the purposes of this chapter.

(c) "River" means the water, bed, and shoreline of rivers, streams, channels, lakes, bays, estuaries, marshes, wetlands and lagoons.

(d) "Free-flowing" means existing or flowing in a natural condition without artificial impoundment, diversion or other modification of the waterway. The presence of low dams, diversion works, and other minor structures shall not automatically bar any river's inclusion within the system; provided, however, that this subdivision shall not be construed to authorize or encourage future construction of such structures on any component of the system.

(e) "System" means the California Wild and Scenic Rivers System.
(Added by Stats.1972, c. 1259, p. 2510, § 1.)

§ 5093.53 Classification of rivers

Those rivers or segments of rivers designated for inclusion in the system shall be classified by the secretary as one of the following:

(a) Wild rivers, which are those rivers or segments of rivers that are free of impoundments and generally inaccessible except by trail, with watersheds or shorelines essentially primitive and waters unpolluted.

(b) Scenic rivers, which are those rivers or segments of rivers that are free of impoundments, with shorelines or watersheds still largely primitive and shorelines largely undeveloped, but accessible in places by roads.

(c) Recreational rivers, which are those rivers or segments of rivers that are readily accessible by road or railroad, that may have some development along their shorelines, and that may have undergone some impoundment or diversion in the past.
(Added by Stats.1972, c. 1259, p. 2510, § 1.)

§ 5093.54 Components of system

The following rivers are designated as components of the system:

(a) Klamath River. The main stem from 100 yards below Iron Gate Dam to the Pacific Ocean; the Scott River from the mouth of Shackleford Creek west of Fort

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Jones to the river mouth near Hamburg; the Salmon River from Cecilville Bridge to the river mouth near Somesbar; the North Fork of the Salmon River from the intersection of the river with the south boundary of the Marble Mountain Wilderness Area to the river mouth; Wooley Creek, from the western boundary of the Marble Mountain Wilderness Area to its confluence with the Salmon River.

(b) Trinity River. The main stem from 100 yards below Lewiston Dam to the river mouth at Weitchpec; the North Fork of the Trinity from the intersection of the river with the southern boundary of the Salmon-Trinity Primitive Area downstream to the river mouth at Helena; New River, from the intersection of the river with the southern boundary of the Salmon-Trinity Primitive Area downstream to the river mouth near Burnt Ranch; South Fork of the Trinity from the junction of the river with State Highway 36 to the river mouth near Salyer.

(c) Smith River and all its tributaries, from the Oregon-California state boundary to the Pacific Ocean.

(d) Eel River. The main stem from 100 yards below Van Arsdale Dam to the Pacific Ocean; the South Fork of the Eel from the mouth of Section Four Creek near Branscomb to the river mouth below Weott; Middle Fork of the Eel from the intersection of the river with the southern boundary of the Middle Eel-Yolla Bolly Wilderness Area to the river mouth at Dos Rios; North Fork of the Eel from the Old Gilman Ranch downstream to the river mouth near Ramsey; Van Duzen River from Dinsmores Bridge downstream to the river mouth near Fortuna. It is the intent of the Legislature, with respect to the Eel River and its tributaries, that after an initial period of 12 years following the effective date of this chapter, the Department of Water Resources shall report to the Legislature as to the need for water supply and flood control projects on the Eel River and its tributaries, and the Legislature shall hold public hearings to determine whether legislation should be enacted to delete all or any segment of the river from the system.

(e) American River. The North Fork from its source to the Iowa Hill Bridge; the Lower American from Nimbus Dam to its junction with the Sacramento River.

(f) Other rivers which qualify for inclusion in the system may be recommended to the Legislature by the secretary.

(Added by Stats.1972, c. 1259, p. 2510, § 1.)

§ 5093.55 Restrictions on construction of dams, reservoirs, other impoundments and diversion of facilities

Except as provided in subdivision (d) of Section 5093.54, no dam, reservoir, or other water impoundment facility, other than temporary flood storage facilities permitted pursuant to Section 5093.57, shall be constructed on or directly affecting any river designated in Section 5093.54 after the effective date of this chapter; nor shall any water diversion facility be constructed on any such river unless and until the secretary determines that such facility is needed to supply domestic water to the residents of the county or counties through which the river flows, and unless and until the secretary determines that facility will not adversely affect its free-flowing condition or natural character.

(Added by Stats.1972, c. 1259, p. 2510, § 1.)

§ 5093.56 Prohibition against governmental cooperation in projects affecting system; exception, Eel River

Except for geologic, hydrologic, economic, or any other technical studies deemed necessary or desirable by the Department of Water Resources in order to determine the feasibility of alternate sites for dams on the Eel River and its tributaries, which studies are hereby authorized, no department or agency of the state shall assist or cooperate, whether by loan, grant, license, or otherwise, with any department or agency of the federal, state, or local government, in the planning or construction of any project that could have an adverse effect on the free-flowing, natural condition of the rivers included in the system.

(Added by Stats.1972, c. 1259, p. 2510, § 1.)

§ 5093.57 Eel River; flood protection

Nothing in this chapter shall be construed to prohibit any measures for flood protection, structural or nonstructural, necessary for the protection of lives and property along the Eel River as described in subdivision (d) of Section 5093.54, except for dams, reservoirs, or other water impoundment structures; provided, however, that such measures for flood protection may include facilities for temporary flood storage or flood storage basins on tributaries of the Eel River.

(Added by Stats.1972, c. 1259, p. 2510, § 1.)

1. In general

Stats.1972, c. 1259, permits all measures for flood protection along the Eel River, except for dams, reservoirs, or other water impoundment structures, including levees along the banks of the Eel River, flood plain zoning and temporary flood storage basins on tributaries of the Eel River.
Op.Leg.Counsel, 1972 A.J. 7795.

§ 5093.58 Duties of secretary

The secretary shall do all of the following:

(a) Determine which of the classes described in Section 5093.53 best fit each segment of the rivers included in the system.

(b) Prepare a management plan to administer the rivers and their adjacent land areas in accordance with such classification.

(c) Submit such management plan to the Legislature for its approval.

(Added by Stats.1972, c. 1259, p. 2510, § 1.)

§ 5093.59 Management plan; hearings

The secretary shall develop the management plan in close cooperation with the counties through which the rivers flow and their political subdivisions. Prior to adoption of any management plan, the secretary shall, after notice, hold a public hearing in each county through which the rivers flow and shall submit the plan *to each county for its review as to the portion of the plan affecting the county.*

(Added by Stats.1972, c. 1259, p. 2510, § 1.)

§ 5093.60. Administration of system

The secretary shall be responsible for the administration of the system. Each component of the system shall be administered so as to protect and enhance the values for which it was included in the system, without unreasonably limiting lumbering, grazing, and other resource uses, where the extent and nature of such uses do not conflict with public use and enjoyment of these values.

(Added by Stats.1972, c. 1259, p. 2510, § 1.)

§ 5093.61 Local powers; water pollution

All departments and agencies of the state and all local governmental agencies shall exercise their powers in a manner consistent with the provisions of this chapter. The Resources Agency shall cooperate with the appropriate water quality control agencies for the purpose of eliminating or diminishing the pollution of waters of the rivers included in the system.

(Added by Stats.1972, c. 1259, p. 2510, § 1.)

§ 5093.62 Fish and wildlife

Nothing in this chapter shall affect the jurisdiction or responsibility of the state with regard to fish and wildlife. Hunting and fishing may be permitted on lands and waters administered as parts of the system under applicable state or federal laws and regulations.

(Added by Stats.1972, c. 1259, p. 2510, § 1.)

§ 5093.63 Eminent domain

Nothing in this chapter shall be construed to permit or require the reservation, use, or taking of private property for scenic, fishery, wildlife, or recreation purposes, for inclusion in the system or for other public use, without just compensation.

(Added by Stats.1972, c. 1259, p. 2510, § 1.)

§ 5093.64 Severability

If any provision of this chapter or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are severable.
(Added by Stats.1972, c. 1259, p. 2510, § 1.)

§ 5093.65 Kings River; construction of water impoundment facility; moratorium until January 1, 1979

No construction of any dam, reservoir or other water impoundment facility shall be commenced prior to January 1, 1979, on the following portion of Kings River: The South (Main) Fork of the Kings River west of the western boundary of the Kings Canyon National Park (Cedar Grove area), and the Middle Fork of the Kings River west of the western boundary of the Kings Canyon National Park (Wilderness area), downstream to their confluence, and thence downstream to the entrance of their waters into Pine Flat Reservoir. It is not the intent of the Legislature by enactment of this section to designate any portion of the Kings River as a component of the system, and hydrologic, environmental, economic and engineering studies, surface and subsurface geologic exploration, and any other technical studies for the purpose of determining the feasibility of a multipurpose flood control, water conservation and hydroelectric project on such portion of Kings River may be undertaken by any local agency or private organization.
(Added by Stats.1973, c. 499, p. 974, § 1.)

Library references
Health and Environment ⇨25.5.

§ 5093.66 to 5093.69 Inoperative

Addition of these sections, which would have included portions of the Stanislaus River in the wild and scenic rivers system, would have authorized temporary flood control facilities but would have prevented construction of dams, was proposed by Initiative Measure, 1974, and was rejected by the electors at the general election held Nov. 5, 1974.

CHAPTER 1.6 STATE BEACH, PARK, RECREATIONAL, AND HISTORICAL FACILITIES BOND ACT OF 1964

§ 5096.26 Acceptance of grants, gifts, devises or bequests

All grants, gifts, devises, or bequests to the state, conditional or unconditional, for park, conservation, recreation or other purposes for which land may be acquired and developed pursuant to this chapter, may be accepted and received on behalf of the state by the appropriate department head with the approval of the Director of Finance. * * *

(Amended by Stats.1972, c. 1222, p. 2358, § 1.)

Transfer of unappropriated balance of grants of federal funds to park and recreation revolving account, see note under § 5098.1.

Asterisks * * * indicate deletions by amendment